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No. 671

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1966.

ALBERT C. DROSTE,

*Appellant,*

*vs.*

OTTO KERNER, Governor of the State of Illinois, WILLIAM CHAMBERLAIN, Secretary of State of the State of Illinois, and JAMES H. GATELY, WILLIAM L. McFETRIDGE, JACOB M. ARVEY, JOHN LEVIN and JOSEPH L. GILL, Commissioners of the Chicago Park District, a municipal corporation, and UNITED STATES STEEL CORPORATION, Intervenor,

*Appellees.*

ON APPEAL FROM THE
SUPREME COURT OF ILLINOIS

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OTTO KERNER, Governor of the State of Illinois, WILLIAM CHAMBERLAIN, Secretary of State of the State of Illinois, and JAMES H. GATELY, WILLIAM L. McFETRIDGE, JACOB M. ARVEY, JOHN LEVIN and JOSEPH L. GILL, Commissioners of the Chicago Park District, a municipal corporation, and UNITED STATES STEEL CORPORATION, Intervenor,

*Appellees.*

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ON APPEAL FROM THE
SUPREME COURT OF ILLINOIS

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## JURISDICTIONAL STATEMENT.

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Appeal is from a judgment of the Supreme Court of Illinois, reversing after grant of rehearing, a previous decision of the same Court which in turn had reversed, after grant of rehearing, the initial decision of that Court to affirm the orders of the Circuit Court of Cook County. These orders dismissed appellant's taxpayer's

suit challenging the constitutional validity of the state statute involved.

Appellant submits this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question of increasing current import, concerning the appropriation of public lands under Lake Michigan by private industry, is presented by the rather unusual complex of state court decisions below.

## OPINIONS BELOW.

The final opinion of the Supreme Court of Illinois appears, together with the dissenting opinion thereto, in 34 Ill. 2d 495, and is reprinted in Appendix A. The preceding opinion of the Supreme Court of Illinois, contrary to the final opinion, and the initial opinion of the Supreme Court of Illinois are not reported and are also reprinted in Appendix A.

## JURISDICTION.

Appellant, in a citizen's representative action, sought to enjoin the consummation of an Illinois statute which gave (for a token consideration) 194 acres of submerged Lake Michigan lands to United States Steel Corporation for its unrestricted private use. This land has been declared by the United States Supreme Court to be held "in trust for the people of the State . . . for purposes in which the whole people are interested . . . for public uses for which they are adapted", and this Court has held the Illinois Legislature not competent to enact legislation which breaches or abdicates that trust. *Illinois Central R. Co.* v. *People of the State of Illinois,* 146 U.S. 387, 452, 456, 457.

Appellant alleged the statute was invalid and unconstitutional. The defendants were the parties necessary to making the challenged conveyance, namely, the Governor, the Secretary of State, the Commissioners of the Chicago Park District (to which this submerged land had long previously been deeded for park and recreational purposes), and the United States Steel Corporation (who intervened "as of right"). The trial court dismissed the Complaint on the merits "for want of equity." (R. I, 57-138.)

The Illinois Supreme Court first affirmed, then reversed and—finally—affirmed the result, but not the grounds, of the trial court's dismissal of the action. Appellant's petition for rehearing from the last decision was denied on May 18, 1966, after the Supreme Court of Illinois had denied a motion by United States Steel Corporation to strike said petition for rehearing. (R.II, 222, 223.)

Notice of Appeal to this Court was filed in the Supreme Court of Illinois on August 15, 1966. (28 U.S.C. §2101(c).) (R. II, 225) The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Illinois Central R. Co.* v. *People of The State of Illinois,* 146 U.S. 387 (16 Fed. 881, 886); *Raley* v. *Ohio,* 360 U.S. 423, 436; *Charleston Federal Savings & Loan Assn.* v. *Alderson,* 324 U.S. 182, 185-6; *Whitney* v. *California,* 274 U.S. 357, 360-1; *Manhattan Life Ins. Co.* v. *Cohen,* 234 U.S. 123, 134; *Miedrich* v. *Lauenstein,* 232 U.S. 236, 242-243; *Winters* v. *New York,* 333 U.S. 507, 509; *Walsh* v. *Columbus Etc. Railroad Co.,* 176 U.S. 469, 475; *Haire* v. *Rice,* 204 U.S. 291, 299.

## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

United States Constitution, XIVth Amendment:

> "... No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Senate Bill 782, 74th Illinois General Assembly, approved June 26, 1963 (Laws of Illinois, 1963, pp. 1229-1231): "A Bill For an Act for the Sale to United States Steel Corporation of the Interest of the State of Illinois in Certain Lands". (Set forth in Appendix B hereto.) (Sometimes hereinafter referred to as "S.B. 782").

## QUESTIONS PRESENTED.

1. Where the Illinois Legislature, by statute, grants to a single named private corporation (United States Steel Corporation) a special franchise of unlimited fee ownership in the publicly-owned submerged lands under Lake Michigan, off-shore of Chicago, which lands are held —under the law as laid down by the United States Supreme Court in reference to these very lands—"in trust for the people of the State" so that the Illinois Legislature does not have unrestricted power of disposition thereover, and which statutory deed contains absolutely no conditions or requirements on the private grantee to protect or assure the accomplishment of any general legislative purpose in the public interest, is not such statute invalid and unconstitutional as being:

(a) contrary to the law of the land as specifically established by this Court; and

(b) in violation of the due process and equal protection clauses of the XIVth Amendment in that such

a statute destroys the property interest of the citizens as beneficiaries of the public trust and constitutes an abdication by the State Legislature of its governmental powers and duties as trustee, and in that such statute enlarges the right of only one designated person in discrimination against the rights of all others.

2. Is the Illinois Supreme Court to be permitted, by the decision below, to nullify the decision of the United States Supreme Court in *Illinois Central R. Co.* v. *People of The State of Illinois,* 146 U.S. 387 (by denying any real effect to the substantive principles established in that case that these Lake Michigan lands are held in public trust for the people of Illinois) and at the same time be permitted to prevent this Court or any other court from ever reviewing or correcting such action (by purporting to announce, in the same decision, a procedural rule which precludes the substantive questions concerning violation of this public trust from being made the grounds of suit).

3. Is it not an unreasonable and unconstitutional framework and classification of remedies for state law to grant standing to bring a citizen's suit alleging violation of both federal and state constitutional and statutory law only in the case where grants or appropriations of public funds (moneys) are involved under challenged legislation, and to deny standing to bring such a suit alleging violation of federal law (and state law) in cases —such as here—where grants of public property are involved under the challenged legislation and where the independent constitutional officer of the State charged with protecting public trust property not only refuses to act in that capacity but, in fact, appears as counsel for those opposing judicial review.

## STATEMENT OF THE CASE.

### Summary.

This Court has held that the land in question is held by the State of Illinois under a special trust to preserve the essential nature of Lake Michigan as a public body of navigable water; and that even a restricted grant to a private corporation is a breach of that trust, unless the parcel of trust land involved is *de minimis*. *Illinois Central R. Co.* v. *People of the State of Illinois,* 146 U.S. 387. The legislation before this Court purports to transfer a substantial part of this trust land to a private corporation by a grant of entirely unrestricted use in fee. Appellant sought to enjoin this breach of trust, asserting, *inter alia,* federal constitutional objections thereto. The Attorney General of Illinois, who "usually" is the public voice in the enforcement of public or charitable trusts (*Holden Hospital Corp.* v. *Southern Ill. Hospital Corp.,* 22 Ill. 2d 150), refused to seek judicial instructions in this matter and appeared as counsel for the state official defendants. The defendant United States Steel Corporation intervened "as of right". The Illinois Supreme Court in its third and final opinion, held that the asserted federal claims were without merit, and then held that the appellant lacked standing under Illinois law.

### The Land In Question Is Held In A Public Trust Protected By Federal Law.

This case does not affect generally land titles derived from grants by the State of Illinois, but only that very limited type of grant which involves the public lands submerged under Lake Michigan. These special state lands—limited in quantity, but perhaps the most valuable of all public lands—are protected by the special limitations on the state's power of disposition thereof

established by decision of the United States Supreme Court. *Illinois Central R. Co.* v. *People of the State of Illinois,* 146 U.S. 387, 450-462.

We are not here concerned with the question—also argued below—whether the Illinois courts had, as a matter of local law, extended the foregoing federal doctrine to the point where absolutely *no* private, industrial (as distinguished from public or navigational) use, however *de minimis* in size, was permitted of these trust lands. See *Illinois Central Railroad Co.* v. *City of Chicago,* 173 Ill. 479, 487, *aff'd* 176 U.S. 646 (4.4 acres for use as a railroad round-house). Rather, this appeal presents the question of violation of the underlying and controlling federal standards of protection established in 146 U.S. 387.

The origins of this public trust are obscure, but its existence was expressly enunciated by this Court and is presently confirmed by the purported reliance in this case, in the decision below of the Illinois Supreme Court, on the doctrines of that federal decision.

It is clear that this trust does not arise by virtue of any retained federal ownership or claim in these lands, and that, therefore, this case is unaffected by any provisions of the Submerged Lands Act (43 U.S.C.A. §§1301-1315) whereby Congress relinquished any such federal claims in certain submerged lands. Illinois, as a Great Lakes state, obtained full title to the bed of Lake Michigan within its boundaries, and, although its Enabling Act and its Resolution of Admission as a State (1818, 3 Stat. 428, 536) expressly preserved the principles of the North West Ordinance of 1787 (that the Great Lakes "shall be common highways and forever free . . .", 1 Stat. 51), no title, ownership, or right or power to administer, develop or use these lands existed in the United States

after the admission of Illinois as a State. (*Escanaba Co.* v. *Chicago,* 107 U.S. 678, 688-9.)

Whatever its origins, the public trust of these lands is clearly protected by federal law. The interests of the public, as beneficiaries of that trust, are safeguarded by the law of this Court (which is the law of the land) that the Illinois Legislature is not *competent* to breach or abdicate its trustee-ship and has not the power, as a State, to dispose of this particular property, except for *de minimis* parcels, other than to uses intrinsic to the nature of the Lake as a public body of water and as a common highway for all. Such was the express decision in *Illinois Central R. Co.* v. *People of the State of Illinois,* 146 U.S. 387, 450-462.

**The Statute Before This Court Is a Breach Of The Public Trust Under Which Illinois Holds These Lands.**

By special statute the Illinois Legislature granted to the United States Steel Corporation a 194 acre tract of off-shore submerged land under Lake Michigan. The statute is a completely unconditional grant in fee, forever, of this public property. Nothing in this statute requires that U.S. Steel build a steel mill,* or—if it does—that it be built within the forseeable future, or within any time limit. No reverter provision protects against the non-use, mis-use, or changed use of this land. The Steel Corpora-

* The Steel Corporation, through some of its local personnel (particularly through the local vice-president in charge of the South Chicago works, who is also chairman of the Chicago Plan Commission), has represented that it needs additional land on which to build "a modern steel mill" in order to aid United States Steel Corporation "to grow and remain competitive in an increasingly competitive steel market." (R. I, 72-30.) There followed the enactment of the special grant here in issue, totally omitting any requirement of any such purported use.

tion simply becomes the owner and is free to use the land for any of its manifold corporate purposes—including, of course, the power to sell it, now, or at any time. No contract of any nature exists which commits U.S. Steel to any future course of action. The preamble of the statute (Section 1) contains a recital of the supposed policy of commercial boosterism behind this special franchise, but its language does not impose any condition on the absolute nature of the grant and, in any event, speaks only of "an important commercial development" in connection with this "useless" (?) submerged land. This could mean any type of private development for profit. Unfortunately, the only thing which this phrase excludes is *public* improvement or development of this recreational and navigational area.**

It should be noted that this statute is not general legislation, whereby the Legislature has undertaken to state, in general terms, what is the public interest to be furthered and what are the best means of effectuating and protecting it. Cf. *Boone* v. *Kingsberry,* 273 Pac. 797 (Calif., 1929), *app. dism'd* and *cert. den.,* 280 U.S. 517 (attempting to extend the public trust established in 146 U.S. 387 to West Coast tide-lands and to a general legislative scheme regulating private licenses therein). The discipline inherent in the requirement that the legislative purpose and means be defined in general terms is the public safeguard of the integrity of the legislative process against adoption of discriminatory, special legislation. No such essen-

** The area in question off the City of Chicago had always been designated by the official city planners for recreation and *harbor* purposes. After the enactment of S.B. 782 by the State Legislature, the Chicago City Council and the Chicago Plan Commission (whose chairman is the local vice-president of United States Steel Corporation) simply altered this recreational and navigational language and began to refer to this area as having been designated for industrial and commercial use.

tial safeguard was present here. No other person—not even another steel company—can qualify for this land under the statute in question, even were such person or corporation to propose "an important commercial development" (to use the words of the preamble of S.B. 782) which would in fact much better effectuate any of the possible criteria for public advantage which, if they could be defined publicly and in terms of general application, might arguably be said to justify legislation permitting private commercial interests in the public lakefront.

The area in question extends eastward from the shoreline of the present United States Steel South Works, along the line of the north edge of a slip in these works, to the Indiana-Illinois boundary; thence north along the state line to its intersection with Seventy-Ninth street extended, thence westward to the shore line.

This tract, when and if filled, will form a great peninsula out into the Lake constituting, for the City of Chicago and almost the entire Illinois shore line north of Indiana, an artificial termination of the southern tip of Lake Michigan.

**Proceedings Below.**

The constitutional validity of this special statute was attacked by means of a common law citizen's and taxpayer's representative suit filed in the Circuit Court of Cook County. Contemporaneously, and to forestall any dilatory claim that the suit should have been filed as a statutory taxpayer's action under *Illinois Revised Statutes,* Ch. 102, Secs. 11-16 ("An Act in relation to suits to restrain and enjoin the disbursement of public moneys by officers of the state"), a separate suit, making the same substantive contentions, was filed thereunder.

The statutory action was dismissed by the trial court, on motion, as not coming within the purview of the stat-

ute, and the appeal in that case became case No. 38249 in the Illinois Supreme Court (R. I, 1-55) and was consolidated for submission and decision with the subsequent appeal in the common law action, which became case No. 38905 in the Illinois Supreme Court.

The common law action was dismissed on the merits by the trial court, which heard extensive argument and treated the case as if submitted for judgment on the pleadings. No evidence was heard. Prior to this ruling, the trial court had over-ruled the motion by the then parties (the Governor and the Secretary of State, represented by the Attorney-General, and the commissioners of the Chicago Park District) to dismiss the case on grounds that only the Attorney-General, and not a citizen and taxpayer, could bring suit concerning the allegedly invalid disposition of public property by public officials and that the Attorney-General did not choose to bring this particular matter to judicial determination. (R. I, 57-33, 34, 35.) (In fact, the Attorney-General appeared in this case, not in his capacity as the independent constitutional officer responsible for the administration of public trusts, but as counsel for the defendants seeking to dismiss the litigation.) Upon the over-ruling of this motion, United States Steel Corporation intervened "as of right" and made itself a party defendant to the amended complaint, which sought a declaratory judgment and an injunction against each and every defendant taking any action to effectuate the grant made by the statute in question. (R. I, 57-38, 40.)

Upon appeal to the Illinois Supreme Court, that Court first rendered an opinion affirming the orders below on the sole ground that plaintiff, as a citizen and taxpayer, had no standing to sue—despite the substantial constitutional issues raissed on the merits and despite the fact that the one person who, under this theory, could raise

these important issues—the Attorney General—expressly refused to submit the matter to judicial scrutiny. Appellant's petition for rehearing from this decision was granted, and, upon re-submission, the Illinois Supreme Court reversed itself and rendered an opinion reversing the orders below and deciding that a citizens' suit was proper and that the statute in question clearly constituted invalid special legislation.

The petitions for rehearing from this latter decision, filed by the defendants, were supported by *amicus* briefs filed by the local steelworkers' union at the Steel Corporation's South Chicago works and by the Illinois Manufacturers' Association on behalf of the similar interests of many of its 5000 members in establishing commercial lake-front use. These petitions for rehearing were granted, and various conservationist groups and independent local planning organizations then filed *amicus* briefs urging the court to adhere to its second opinion. Upon and after this rehearing, the Illinois Supreme Court again reversed itself and affirmed the orders below, rendering an opinion of which the dissent says, "By a curious inversion the majority opinion first decides the case on the merits, and then determines that the plaintiff has no standing to raise the issues that have already been decided."

Appellant's petition for rehearing from this last decision of the Illinois Supreme Court was denied, and this appeal followed.

**How The Federal Question Is Presented.**

The Federal question of the constitutionality of S.B. 782 under the XIVth Amendment was raised specifically in the Amended Complaint and in the appellant's briefs before the Illinois Supreme Court, and that Court ex-

pressly passed on the due process issue in its majority opinion, from which this appeal is taken:

> "The plaintiff suggests other constitutional grounds of attack on the statute in question, such as insufficiency of its title and violation of due process. We have carefully examined them and find them without merit." (R. II, 194.)

Further, the opinion below expressly confirmed the existence of the public trust in the lands in issue and placed major reliance in respect thereto on the case of *Illinois Central R. Co.* v. *People of the State of Illinois*, 146 U.S. 387, which established the protection of that trust under federal law.

The express consideration and disposition of the XIVth Amendment issue and of the issue of the protection of the public trust eliminates any question here of the proper presentation of a federal claim. *Raley* v. *Ohio*, 360 U.S. 423, 436; *Charleston Federal Savings & Loan Assn.* v. *Alderson*, 324 U.S. 182, 185-6; *Whitney* v. *California*, 274 U.S. 357, 360-1; *Manhattan Life Ins. Co.* v. *Cohen*, 234 U.S. 123, 134.

In any event, the Complaint upon which the case was determined alleged that "any such conveyance [as authorized by S.B. 782] is invalid, unauthorized and void under the constitutions, statutes and laws of the United States and of the State of Illinois." It went on specifically to allege the constitutional (XIVth Amendment due process and equal protection) points that: (a) this was public trust property in which the individual members of the public had an interest which the State of Illinois could not abrogate ["Under the basic law, the State of Illinois holds title to the lands covered by the waters of Lake Michigan lying within its boundaries in trust for the people of the entire state, including plaintiff and all

other citizens and taxpayers of the State, and the State of Illinois has no power to barter and sell or relinquish such lands to or for the benefit of private persons or corporations, such as the United States Steel Corporation"] (R. I, 57-12); (b) this was an invalid delegation and abdication of legislative power to private persons, *Seattle Trust Co.* v. *Roberge,* 278 U.S. 116, 122 ["Said statute is a clear and unconditional relinquishment by the Legislature of its governmental powers to private persons for private purposes"] (R. I, 57-13); and (c) this was unconstitutionally discriminatory special legislation.

In the Illinois Supreme Court, appellant's brief argued each of the above points at length after stating that "The issue presented on this appeal is the invalidity of a statute, passed by the State Legislature, by reason of the foregoing law and constitutional provisions" (*i.e.*) "Article II, Section 2 of the Illinois Constitution" [due process], "the XIVth Amendment to the Constitution of the United States" [due process and equal protection] . . . "and Article IV, Section 22 of the Illinois Constitution" [special law granting any special or exclusive privilege]. (R. I, 62-8)

The public trust and the abdication of legislative powers arguments were clearly Federal Constitutional points and recognized as such by the major citation in the Illinois Supreme Court's final majority opinion of the case of *Illinois Central R. Co.* v. *People of the State of Illinois,* 146 U.S. 387, 450-462, which had held invalid on precisely these grounds an 1869 Illinois statute granting away submerged Lake Michigan lands. Although the opinion of the United States Supreme Court did not expressly refer to any particular section of the U. S. Constitution, the question specifically posed was—treating the contested statutory grant as if it gave "full and com-

plete power to use and dispose of'' submerged Lake lands (which is precisely what the grant in fee in the present case does)—''whether the Legislature was competent to make a grant of the kind.'' (146 U.S., at p. 450.) That question was answered by holding that a grant of submerged lands which is in violation of or in abdication of the public trust (''which requires the government of the State to preserve such waters to the use of the public'') is beyond the ''police powers'' of the State. (146 U.S., at pp. 453, 459)

The special legislation point, although aimed in the Illinois court at the specific Illinois Constitutional provision thereon (the Illinois Constitution has no ''equal protection'' clause, in so many words), was nevertheless clearly a Federal Constitutional point under appellant's claim of violation of the XIVth Amendment, by reason of the established doctrine of the Illinois Supreme Court that ''Section 22 of Article IV of our constitution . . . supplements the equal protection clause of the Fourteenth Amendment to the Federal Constitution and prevents the enlargement of the rights of one or more persons in discrimination against the rights of others.'' *Schuman* v. *Chicago Transit Authority,* 407 Ill. 313, 317 (1950).

**The procedural aspect of the decision below, denying a citizen standing to sue for protection against breach of this public trust, is not an independent state ground of decision which can defeat review by this Court.**

Not only does the procedural decision below, taken alone, raise Federal Constitutional questions, but the appending of that ground of decision at the very end of the Illinois Court's third opinion is, in fact, a persuasive reason why this Court should review this case. *Postal*

*Telegraph Cable Co.* v. *Newport,* 247 U.S. 464, 475-6; *Davis* v. *Wechsler,* 263 U.S. 22, 24; *Barr* v. *City of Columbia,* 378 U.S. 146, 149-50.

In the major portion of the final opinion below appellant's asserted claims to protection under federal law of his and other citizens' rights as beneficiaries of the conceded public trust of these lands were, for the first time, taken up and, with major purported reliance on the law as established by this Court's decision in 146 U.S. 387, decided on the merits against appellant. The statement and application made below of the substantive aspects of the controlling federal doctrine is, we believe, patently unsound and erroneous; but they will stand forever as future precedent on the merits of the substantive questions here presented unless corrected *in this case* by this Court. For, unless review is given here, the inexplicable, appended procedural ruling below—denying standing ever to raise these substantive issues again—will cause the substantive determination of federal law there made to stand without the possibility of present or future challenge or correction. Appellant's asserted federal claims have in fact been decided against him, in a lengthy opinion below. The fact that such decision then goes on, as Mr. Justice Schaefer said, "by a curious inversion" to state that there is no right to have such claims decided—a procedural rule completely opposite to the law stated in the Court's second opinion—cannot be used to prevent this Court from correcting the virtual nullification of federal substantive law which the Court below has, at the same time, spread of record. Cf. *Irvin* v. *Dowd,* 359 U.S. 394, 403-4. *Barr* v. *City of Columbia,* 378 U.S. 146, 149-150.

This Court has held that "the question of when and how defaults in compliance with state procedural rules can

preclude our consideration of a federal question is itself a federal question." (*Henry* v. *Mississippi,* 379 U.S. 443, 447.)

Moreover, the procedural decision below in itself produces a remedial framework for citizens' representative actions in Illinois which offends Federal Constitutional standards. It is not contended here that Illinois might not ban all citizens' suits, even where claims of violation of federal rights by the public officials-defendants are made; but, if such suits are permitted (as they are when the public official is spending money appropriated by the Legislature for the challenged purpose), arbitrary discriminations between which of such suits are tolerated and which are not cannot be made. The distinction between appropriating public funds and appropriating public property, when both are done pursuant to express statutory provision, appears on its face to be arbitrary, were it not for the possible justification that, in the latter case, the Attorney General, as an independent constitutional officer vested with visitatorial powers *parens patriae,* has a duty and obligation to prevent misappropriation of public property and public trusts. We do not say that such a remedial framework is necessarily discriminatory and invalid, *when the Attorney General in fact carries out his responsibilities* and the public is not left remedyless. But, as was argued at length at every stage of the proceedings below, when—as here—the Attorney General not only refuses to act in his constitutional capacity to obtain judicial instructions on a subject which everyone must concede is legitimately debatable and of great importance, but in fact incapacitates himself to do so and appears as counsel for the defendants seeking to quash the litigation, then the remedial framework devised by the opinion below passes permitted bounds.

Other state courts, when faced with this same situation, have recognized that the citizen must, under such circumstances, be permitted standing to sue. *Baier* v. *City of Saint Albans,* 39 S.E. 2d 145, 150-1 (W. Va., 1946); *D. N. Kelly & Son* v. *Selectmen of Town of Fairhaven,* 3 N.E. 2d 241, 243 (Mass., 1936).

Subsequent to the trial court's over-ruling of the motion to dismiss for lack of standing (even the local trial court ruled the Illinois law to be as set forth in the Illinois Supreme Court's second opinion), the Steel Corporation intervened as a private party defendant to this action for declaratory judgment and injunction. This would seem, in any event, to have eliminated any question of the standing of the suit to proceed to judgment at least against U. S. Steel. This factor was never discussed in the opinion below.

Illinois may be generally free to devise its own framework of remedies for citizens' suits alleging federal claims, but we submit that it cannot constitutionally end up with the essentially unfounded, arbitrary and unexpected procedural result which was reached in the decision below. Nor can it use that result to prevent a review of its decision upon the substantive federal questions involved. *Davis* v. *Wechsler,* 263 U.S. 22, 24; *Ward* v. *Love County,* 253 U.S. 17, 22; *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 457; *Staub* v. *City of Baxeley,* 355 U.S. 313, 320; *Barr* v. *City of Columbia,* 378 U.S. 146, 149-150. See *Henry* v. *Mississippi,* 379 U.S. 443, 447.

The only decision of the Illinois Supreme Court which decided appellant's asserted federal rights against him was its last decision, the same decision which held he could not raise those rights in the Illinois courts. The only opportunity appellant had to object to this anomalous, un-

expectable and unconstitutional result was in his last petition for rehearing, and this was done. (R. II, 209-14.) *Saunders* v. *Shaw,* 244 U.S. 317, 320; *Great Northern R. Co.* v. *Sunburst Oil Co.,* 287 U.S. 358, 367; *Missouri* v. *Gahner,* 281 U.S. 313, 320.

## THE QUESTIONS ARE SUBSTANTIAL.

No question today is more important to the public, and has aroused more current governmental and citizen interest, than the problem of the industrial despoilation of our major natural waterways, including the particular subject of concern here, the Great Lakes.

If there is *any* public trust of Lake Michigan submerged lands which is protected by federal law (and this is conceded herein both by the appellees and in the decision below), an absolute conveyance to a single, favored private corporation without any restrictions or conditions *must* violate that trust.

The decision below demands review because the state statute here in question is so extreme that, if it is valid, there are *no* limits on the power of industry to usurp the public trust lands submerged under Lake Michigan.

And the decision below comes at a time when millions of citizens along the Great Lakes are being subjected to a new onslaught of industrial appropriation of off-shore lands. See Department of Housing and Urban Development, Open Space for Urban America, 5-7. The present case is one of a series of citizens' battles currently being waged against this depredation in Indiana and in Illinois. The great unorganized body of citizens (whose heritage is the Lake) find themselves outmaneuvered by the special interest pleaders and virtually without a voice in the local councils of power, and desperately in need of a forum—

such as only the United States Supreme Court can provide—which is at a point of judicious remove from the local arena.

In this very case we see a vivid example of history repeating itself—a history of industrial exploitation which one would have thought belongs only to a bygone era. In 1910, the United States Steel Corporation's predecessor company succeeded in using the political processes to overcome the legal opinion of the Corporation Counsel of the City of Chicago and to prevent a judicial test of the validity of its being granted the very lands (then submerged, but upon which the steel company had placed pilings and other purprestures) which now form the western shoreline of the recent and most extensive grant to the Steel Corporation which is here in issue. (R. I, 62—App. B, last page.) Had the substantive issue involved here not been of such compelling importance in the present day this case also might have been similarly disposed of—as it was in the first decision below of the Illinois Supreme Court—without the public's obtaining any judicial inquiry into the merits of this appropriation of public Lake lands to private industrial use.

It is not contended that, consistent with the federal protection of the public trust covering these lands, Illinois could not under any circumstances convey parts thereof to United States Steel or other private parties. But this cannot be done under the standards announced by the court below. That decision permits the trust to be administered by means of special legislation granting to favored individuals large, extensive tracts (here, 194 acres), which by no stretch of argument can come within the *de minimis* exception intended by this Court in using the phrase "grants of parcels which, being occupied, do not substantially impair the public interest in the lands

and waters remaining," (146 U.S., at p. 452). The decision here also reduces to meaninglessness the statement made by this Court of the protective purpose of the public trust doctrine—"navigation of the waters, *carry[ing] on commerce over them, and* [the] liberty of fishing therein", 146 U.S., at p. 452—by substituting therefor the phrase "in aid of commerce." (R. II, 192.) Any private industrial or commercial activity today is "commerce", and, relating this new concept ("in aid of commerce") to the preamble of the statute in question ("an important commercial development"), produces the result which we have below, namely, that the very administration of the *public* trust becomes simply a matter of granting these lands away to "important" private corporations.

Under the interpretation given below, even the grant to the Illinois Central Railroad which this Court held invalid in 146 U. S. 387, would have to be sustained. It is obvious that the decision appealed from does not keep faith with the true meaning of the protection under federal law accorded the rights of the beneficiaries of this trust (the public) by the controlling decision of this Court.

## ALTERNATIVE PRAYER FOR CERTIORARI.

Appellant prays that, should this Court determine that certiorari rather than appeal is the proper mode of review, the papers herein be taken and acted upon as a petition for certiorari and that a writ of certiorari issue to review the judgment below of the Illinois Supreme Court.

## CONCLUSION.

We believe that the federal questions presented herein are substantial, directly involving a misapplication of the law of the public trust of the Lake Michigan lands off-shore of Chicago as laid down by this Court, and that they are of great long-range consequence and current importance to the general public.

Respectfully submitted,

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## APPENDIX A.

**Opinion and Dissenting Opinion of the Supreme Court of Illinois, filed March 14, 1966:**

Docket Nos. 38249, 38905 cons.—Agenda 56—January, 1966.

Albert C. Droste, Appellant, v. Otto Kerner, Governor, *et al.,* Appellees.—(United States Steel Corporation, Intervenor-Appellee.)

Mr. Chief Justice Klingbiel delivered the opinion of the court:

We have consolidated two appeals seeking to attack an enactment of the Seventy-fourth General Assembly.

The source of the litigation is Senate Bill 782, approved June 26, 1963, whereby the legislature "granted, quit-claimed and conveyed in fee" to the United States Steel Corporation 194.6 acres of land submerged beneath the waters of Lake Michigan, with the proviso that the grant was to become effective when the corporation had paid $19,460 to the State Treasurer, and the Chicago Park District had conveyed all of its right, title and interest in the submerged lands to the State of Illinois. (Laws of 1963, pp. 1229-1231). Several months later plaintiff, Albert C. Droste, instituted two separate taxpayer actions to enjoin the sale and transfer, naming as defendants in each action the Commissioners of the Chicago Park District and the Governor and Secretary of State of Illinois. The Governor and Secretary of State have appeared by the Attorney General and support the validity of the act.

One action (No. 38249) was brought purportedly under authority derived from the Public Moneys Act, (Ill. Rev. Stat. 1963, chap. 102, pars. 11—16,) which permits a taxpayer to initiate an action to enjoin the "disbursement" of "public funds" and "public moneys" by State officials. In accordance with such act the action was commenced by

filing a petition for leave to file a complaint, the proffered complaint in this instance alleging the constitutional invalidity of S.B. 782. Leave to file was denied, the trial court being of the opinion that a suit to enjoin the conveyance of land was not encompassed by the Public Moneys Act. Plaintiff has appealed directly to this court.

In plaintiff's second action (No. 38905), admittedly initiated because of his doubts as to the statutory footing of his first action, he alleged the constitutional invalidity of S.B. 782, alleged that the conveyance was in violation of the theory of public trust advanced in *Illinois Central Railroad Co.* v. *City of Chicago,* 173 Ill. 471, and prayed for a declaration of invalidity, an injunction to restrain the conveyance, and a writ of *mandamus* to compel defendants to seek a judicial determination of the validity of the proposed conveyance before the conveyance should be made. Defendants filed motions to dismiss on grounds that plaintiff had not alleged facts showing special damage or injury to himself different in degree or kind from that suffered by the general public, and that he failed to allege facts showing that his taxes would be increased if the conveyance was carried out in compliance with S.B. 782. These motions were denied, whereupon defendants filed answers asserting the validity of the bill. At this point United States Steel Corporation sought and obtained leave to intervene in this action. Its answer described its situation as the owner of all the shore and upland immediately adjacent to the submerged land in question, pleaded the validity of S.B. 782, and, by way of affirmative defense, challenged the standing of plaintiff to maintain the action. In this case the parties elected to offer no proof, and the trial court therefore considered the action as pending on a motion for judgment on the pleadings. After hearing argument, the court found that S.B. 782 was valid, and dismissed the complaint for want of equity. Plaintiff also prosecuted his appeal from that judgment directly to this court.

At the outset, we must consider our jurisdiction to entertain these direct appeals. The parties cannc confer

that jurisdiction by consent or acquiescence. *Kelly* v. *Guild*, 25 Ill. 2d 511.

The principal ground relied upon by plaintiff to support our jurisdiction is his contention that the act in question violates section 22 of article IV of the Illinois constitution, which imposes certain limitations upon the legislative powers of the General Assembly. It is fundamental that the constitution is not regarded as a grant of powers to the legislative department but every subject within the scope of civil government rests in the General Assembly unless inhibited by some constitutional provision. *People* v. *Dale*, 406 Ill. 238.

It was well settled, prior to the constitution of 1870, that subject to the paramount power of the Federal government over commerce, including navigation, title to the lands submerged by the waters of Lake Michigan lying within the boundaries of Illinois rested in the State of Illinois in trust to protect the rights of the public in the use of those navigable waters for fishing, boating, recreation and other public purposes. This did not mean, however, that the shoreline was required forever to remain unchanged except by natural causes. An equally important part of the doctrine was that the State might from time to time relinquish its trust as to specific parcels of submerged lands by action of the General Assembly in granting to a shore owner title to those lands adjacent to his property where the grant was in aid of commerce and where the public interest in the lands and waters remaining was not substantially impaired. *Illinois Central Railroad Co.* v. *Illinois*, 146 U.S. 387, 36 L. Ed. 1018, and authorities cited.

The proper execution of this public trust with respect to submerged lands requires that the conveyance of any particular parcel to a shore owner be consistent with the public interest and not impair the interest of the public in the lands and waters remaining. It would not be possible for the State to make that determination in the administration of the trust unless it has the power to specify

the individual or corporation to whom the submerged lands are to be conveyed. We are not prepared to hold that section 22 of article IV of our constitution was intended to abrogate the public trust doctrine with respect to submerged lands or to render that doctrine unworkable.

The plaintiff refers to the clause of section 22 of article IV, which prohibits local or special laws vacating roads, town plats, streets, alleys and "public grounds". We do not believe that it can be fairly said that this general language evidences an intent on the part of the framers of our constitution to withdraw or impair the legislative power to continue with the administration of its public trust relative to submerged lands. Plaintiff also refers to the further clause of section 22 of article IV which prohibits local or special laws granting to any corporation, association or individual "any special or exclusive privilege, immunity or franchise whatever." Again we think that it would be a very narrow and unrealistic construction of this language to say that it was intended to withdraw, for all practical purposes, the legislature's power to administer its public trust with respect to submerged lands as that power existed in 1870. Had the framers of the constitution intended to impair this well-established power they would have said so in direct and positive language. It is significant that the legislature and those concerned in the carrying out of the law continued after 1870 to administer the public trust doctrine as they had before by making conveyances to shore owners where it was determined by legislative authority that such conveyances would be in aid of commerce and would not substantially impair the public interest in the lands and waters remaining. Furthermore many conveyances and releases by the State of its interest in nonsubmerged lands have, after 1870, been made to individual and corporate grantees upon authority of the General Assembly. This contemporaneous and practical construction over the years by the legislature and those concerned in the administration of the law is entitled to great weight. *Cook County* v. *Healy,* 222 Ill. 310; *People ex rel. Sadler* v. *Olson,* 245 Ill. 288.

Plaintiff places reliance on *Illinois Central Railroad Co.* v. *City of Chicago,* 173 Ill. 471. There the question was whether legislative authority existed to fill in the waters of Lake Michigan. It was held that such legislative authority had not been given and that the fill was therefore improper. That decision does not aid plaintiff.

In *People ex rel. Maloney* v. *Kirk,* 162 Ill. 138, an action was instituted by the State of Illinois, acting by its Attorney General, questioning the power of the General Assembly to authorize the conveyance to specific shore owners of certain lands, submerged by the waters of Lake Michigan, lying adjacent to their respective properties. While the conveyances were not made directly by the State to the respective grantees, the Board of Park Commissioners was authorized by the statute to execute and make such conveyances to various shore owners. In considering the validity of that statute, we said at p. 148: "The question before us is not one of policy or expediency, but of power. Was the legislature clothed with power to convey reclaimed lands which were originally covered by the waters of Lake Michigan?" We answered that question in the affirmative pointing out that the People had "spoken through their representatives, who were clothed by them with full power to act." If the legislature, as held in the *Kirk* case, had power to authorize such a conveyance to a specific shore owner by the Board of Park Commissioners, an agency of the State, it necessarily follows that the legislature had power to authorize the conveyance provided for by the act in question. In this connection we point out that the legislature, in section 1 of the present statute, expressly declared that "the grant of submerged land contained in this Act is made in aid of commerce and will create no impairment of the public interest in the lands and water remaining, but will instead result in the conversion of otherwise useless and unproductive submerged land into an important commercial development to the benefit of the People of the State of Illinois." The act was duly approved by the Governor and, prior to its passage and approval, the Chicago City

Council had unanimously adopted a resolution urging the statute's enactment. We cannot assume that the legislative finding contained in section I of the act was factually incorrect or that it was not made in the utmost good faith.

The *Kirk* case, sustaining grants to specified grantees, has never been overruled but has been relied upon by the public and property owners in Illinois over a period of almost 70 years. It has become a rule of property and should not now be overturned.

The plaintiff suggests other constitutional grounds of attack on the statute in question, such as insufficiency of its title and violation of due process. We have carefully examined them and find them to be without merit. The trial court determined that under the constitution and laws of Illinois, including section 22 of article IV of the Illinois constitution, the legislature had the power to pass the legislation in question, and that the act of June 26, 1963, is valid. We conclude that this determination of the trial court is correct.

While we do not agree that the act in question violates section 22 of article IV of the Illinois constitution, as contended by plaintiff, we conclude that the constitutional question raised is sufficient to give this court jurisdiction on these direct appeals. We will therefore pass on to consider the other points raised and argued by the parties.

Plaintiff, in support of his right to sue under the Public Moneys Act in case No. 38249, contends that a liberal construction of the act would make it applicable to this case, and that this court should extend the "expeditious and protective" procedures permitted by the act to all cases where "high public officials" refuse "to subject their own doubtful actions to judicial scrutiny."

Reduced to its simplest terms the first issue presented by plaintiff's arguments is whether the legislature, in enacting the public Moneys Act, intended for a taxpayer to be given the right to enjoin the conveyance of land by State officers, or, as defendants put it, the right to enjoin

a legislative grant of real estate. Plaintiff concedes that the act does not grant such right in express terms, but asks that we liberally construe the words "public funds" to include public property such as real estate, and on this basis sustain his standing to maintain this action. It is, however, the cardinal rule in the interpretation and construction of statutes that the legislative intention should be ascertained and given effect. (*Petterson* v. *City of Naperville,* 9 Ill. 2d 233.) This is done primarily from a consideration of the legislative language itself, which affords the best means of its exposition, and if the legislative intent can be ascertained therefrom it must prevail and be given effect. (*People ex rel. Mayfield* v. *City of Springfield,* 16 Ill. 2d 609.) There is no rule of construction which authorizes a court to declare that the legislature did not mean what the plain language of a statute imports, (*City of Decatur* v. *German,* 310 Ill. 591,) and it has been frequently stated that words employed in a statute should be given their plain and ordinary, or commonly accepted or popular, meaning unless to do so would defeat the legislative intent. *Lincoln National Life Ins. Co.* v. *McCarthy,* 10 Ill. 2d 489; *Revzan* v. *Nudelman,* 370 Ill. 180.

Applying these criteria here it is manifest that the "liberal construction" for which plaintiff contends cannot prevail. Webster's New International Dictionary, 2d ed. p. 2005, defines "public funds" as being: "Moneys belonging to a government, or any department of it, in the hands of a public official." (See also: Cases collected in Words & Phrases, Perm. ed. vol. 35, pp. 164-172.) Approximately the same definition is given in Black's Law Dictionary, 4th ed., p. 802, and this court has on two occasions stated that the word "funds", in its common usage, "ordinarily means money or negotiable instruments readily convertible into cash, and has been defined as property of every kind when such property is contemplated as something to be used for payment of debts." (*People ex rel. Illinois Armory Board* v. *Kelly,* 369 Ill. 280, 284-285; *Broadway Bank of St. Louis* v. *McGee Creek Levee and Draining Dist.* 292 Ill. 560, 565.) In the face of these accepted meanings, the legislature could not have contemplated real

estate when it referred to "public funds", nor may this court torture the meaning of the words employed to arrive at that result. Furthermore, the Public Moneys Act speaks of permitting a taxpayer to enjoin the "disbursement" of public funds, and a conveyance of land is not a "paying out of revenues" (See: Webster's New International Dictionary, 2d ed., p. 741; Merriam-Webster, Seventh New Collegiate Dictionary, p. 237.). Accordingly, we conclude the trial court was correct in its determination that the Public Moneys Act did not give plaintiff standing to maintain this action.

Nor, as plaintiff alternatively suggests, may this court extend the operation of the act to suits involving the conveyance of land by State officials. Courts have no legislative powers, and their sole function is to determine and, within the constitutional limits of the legislative power, give effect to the intention of the lawmaking body. We will not and cannot inject provisions not found in a statute, however desirable or beneficial they may be. *Western National Bank of Cicero* v. *Village of Kildeer,* 19 Ill. 2d 342; *People ex rel. Honefenger* v. *Burris,* 408 Ill. 68.

With respect to plaintiff's second action (No. 38905), it has long been the law in Illinois that an individual, be he a taxpayer, (*Koehler* v. *A Century of Progress,* 354 Ill. 347; *McPike* v. *Illinois Terminal Railroad Co.,* 305 Ill. 298), or a property owner, (*McCormick* v. *Chicago Yacht Club,* 331 Ill. 514; *Carstens* v. *City of Wood River,* 344 Ill. 319), in the absence of statutory authority conferring such right, has no standing in equity to enjoin an alleged misuse of property held in trust for the public, unless he alleges and proves that he will suffer special damage, different in degree and in kind from that suffered by the public at large. The amended complaint of plaintiff in this action is totally devoid of allegations which set forth such special damage. Without such allegations he has no standing to bring this suit.

The complaint in this action also alleged that plaintiff was seeking to enjoin the expenditure of public funds and, with respect thereto, it was alleged that in order to carry

out S.B. 782, State funds would be expended for the preparation of land surveys, economic surveys, title reports, land use maps, expenses of recording and the like. We believe these allegations amount to no more than speculative conclusions. But in any event, the expenditures which plaintiff alleges are *de minimis* for purposes of standing to sue as a taxpayer. (See: *Payne* v. *Emmerson,* 290 Ill. 490, 495; *Fletcher* v. *City of Paris,* 377 Ill. 89.) As was said in *Ryan* v. *City of Chicago,* 369 Ill. 59, 64, under comparable circumstances, such items of expense are "too trifling to be reflected in appellant's tax bills." In addition, the complaint alleges that use of the property by the grantee will cause the city of Chicago and the State of Illinois to make large expenditures of public funds for roads, sewers and other public improvements. Once again, however, such allegations are purely conjectural, and are unsupported by any of the provisions of S.B. 782. We conclude that cause No. 38905 was properly dismissed for the failure of plaintiff to allege facts giving him standing to maintain the action.

The decrees of the court below are affirmed.

*Decrees affirmed.*

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Mr. Justice Schaefer, dissenting:

By a curious inversion the majority opinion first decides the case on the merits, and then determines that the plaintiff has no standing to raise the issues that have already been decided. I am unable to agree with either determination. The nature of the problems, and their importance, preclude a cursory statement of the reasons for my disagreement.

Illinois has long recognized the right of a citizen and taxpayer to sue in equity to enjoin the misappropriation of public funds. In *Colton* v. *Hanchett,* (1852) 13 Ill. 615, a taxpayer was permitted to sue to enjoin the county Board of Supervisors from illegally disbursing county revenue, because the case involved "a question affecting

the public interest" and because no other remedy was as "direct, speedy and efficacious." And in *City of Springfield* v. *Edwards,* (1877) 84 Ill. 626, the court sustained an injunction to restrain the incurring of municipal indebtedness in violation of the constitutional debt limit, saying: "We may dismiss the objection that the complainant does not show in his bill that he is injured by the acts complained of, otherwise than in common with all other taxpayers in the city, with the observation that it has been held in this State that such an injury is sufficient to entitle him to an injunction, and that the question is not open to further discussion. *Colton et al.* v. *Hanchett et al.,* 13 Ill. 615; *Perry et al.* v. *Kinnear et al.,* 42 id. 160; and *Beauchamp* v. *Board of Supervisors, etc.,* 45 id. 274." 84 Ill. at 631.

In 1887 the doctrine that had previously been applied to illegal expenditures of public funds was applied to the illegal disposition of public land. In *McCord* v. *Pike,* 121 Ill. 288, the court held that a taxpayer's bill in equity would lie to restrain the board of county commissioners of Cook County from illegally executing and delivering a deed conveying property of the county. In *Littler* v. *Jayne,* (1888) 124 Ill. 123, the court applied the same doctrine to the misuse of state assets. In this case a state taxpayer sought to enjoin the State House Commissioners from approving vouchers which would have led to the expenditure of funds under an illegal contract. Without prolonged discussion, and upon the authority of the local government cases, the propriety of the action was sustained. See also *Burke* v. *Snively,* (1904) 208 Ill. 328.

In 1915 the court decided *Jones* v. *O'Connell,* 266 Ill. 443, and *Fergus* v. *Russel,* 270 Ill. 304. In the *Jones* case a taxpayer brought an action to restrain the county treasurer of Cook County from illegally retaining a percentage of inheritance taxes which he would collect in the future, and to compel him to pay over to the state treasurer amounts he had illegally retained in the past. In sustaining the plaintiff's right to equitable relief, the court said: "If taxpayers have a right or interest which the bill in this case

was intended to protect it is of a purely equitable nature, the legal right and title being in the State. If the defendant, O'Connell, has money in his hands which he has no right to retain but which he is bound to pay to the State treasurer, the sum retained by him must be made up by taxation, and every tax-payer has an equitable right to see that the money so unlawfully retained shall be paid to the State treasurer for the use of the State. This court has always recognized that rule and has uniformly held that the tax-payers are in equity the owners of the property of a municipality, and whenever public officials threaten to pay out public funds for a purpose unauthorized by law or misappropriate such funds, equity will assume jurisdiction to prevent the unauthorized act or to redress the wrong, and this is because the right and interest are equitable in their nature and are not recognized by courts of law." 266 Ill. at 447.

In *Fergus* v. *Russel,* the underlying basis of the taxpayer's suit was again articulated. There a state taxpayer sued to enjoin the payment of a number of legislative appropriations. The Court said "We have repeatedly held that tax-payers may resort to a court of equity to prevent the misapplication of public funds, and that this right is based upon the taxpayer's equitable ownership of such funds and their liability to replenish the public treasury for the deficiency which would be caused by the misappropriation. * * * Upon principle and reason we perceive no distinction between the right of a taxpayer to enjoin the misappropriation of public funds from a municipal treasury and the right to enjoin an invalid appropriation of the public funds from the State treasury." 270 Ill. at 314, 315.

The majority opinion disposes of plaintiff's right to maintain his nonstatutory action in a single sentence, stating that a taxpayer "has no standing in equity to enjoin an alleged misuse of property held in trust for the public, unless he alleges and proves that he will suffer special damage, different in degree and in kind from that suffered by the public at large." In reaching this conclu-

sion the court relies upon two decisions which involved taxpayers' actions: *Koehler* v. *A Century of Progress,* 354 Ill. 347, and *McPike* v. *Illinois Terminal Railroad Co.,* 305 Ill. 298. These decisions do not, in my opinion, justify a departure from the long-standing recognition of the right of a taxpayer to enjoin the illegal alienation of public property.

In *Koehler* v. *A Century of Progress* a taxpayer was denied standing to enjoin an alleged temporary misuse of public land and to seek the appointment of a receiver to collect "just and reasonable" rents from the private corporation which was permitted to use the public land. The court said: "The lands involved here and which are described in the bill are held in trust by the South Park Commissioners for the use of such lands by the public. An obstruction or mis-use of public property which does not result in special injury to the individual cannot be complained of except by the people. To entitle a tax-payer to maintain a bill to enjoin a breach of public trust, he must, in the absence of statutory authority conferring such right, show that he is specially injured thereby. * * * He is entitled to invoke equitable jurisdiction only to protect his property from threatened injury, and unless it is shown that he will suffer damage, different in degree and kind from that suffered by the public at large, he will not be heard to complain of mis-use of public property. *Carstens* v. *City of Wood River,* 344 Ill. 319; *McCormick* v. *Chicago Yacht Club,* 331 id. 514; *McPike* v. *Illinois Terminal Railroad Co.,* 305 id. 298; *Hill* v. *St. Louis and Northeastern Railway Co.,* 243 id. 344." 354 Ill. at 349, 350.

In *McPike* v. *Illinois Terminal Railroad Co.* the court said: "The rule is that the obstruction or misuse of streets or other like property held by the city for the use of the public which does not result in special injury to the individual cannot be complained of by an individual. If special injury results to the individual he may enjoin such obstruction although the city has given its acquiescence thereto. (*Ochler* v. *Levy,* 234 Ill. 595; *Hamilton* v. *Semet*

*Solvay Co.*, 227 id. 501; *Guttery* v. *Glenn, supra; City of Chicago* v. *Union Building Ass'n*, 102 Ill. 379; *McDonald* v. *English*, 85 id. 232.)" 305 Ill. at 302.

The cases relied upon by the majority and the line of authority of which they are a part rest upon considerations other than those that have supported the taxpayer's action. Their roots lie in the doctrine of public nuisance and they have regarded the encroachments, obstructions and misuse of public property with which they were concerned as public nuisances. In *Guttery* v. *Glenn*, 201 Ill. 275, 290-291, for example, the court said: "If, however, it were true that Union street is a street, which crosses the public square, then its enclosure by the board of trustees was a public nuisance. It is well settled that a public nuisance will not be restrained at the suit of a private person, unless such person suffers therefrom a special and particular injury distinct from that suffered by him in common with the public at large. In the American and English Encyclopedia of Law, (vol. 10—1st ed.—p. 838) it is said: 'Where the nuisance is public, the plaintiff, to obtain an injunction, must allege in his bill, and prove if need be, special damages peculiar to himself distinct from the public at large.' In *McDonald* v. *English*, 85 Ill. 232, we said (p. 236): 'We regard the rule as well settled, that for any obstruction to streets, not resulting in special injury to the individual, the public, only, can complain. Where, however, the obstruction is such that a public prosecution is authorized, and, at the same time, an individual has been specially injured thereby, as well as where the act has been private and an offense against the individual, solely, he may maintain an action and recover for his special injury.' (*City of Chicago* v. *Union Building Assn.*, 102 Ill. 379; *City of East St. Louis* v. *O'Flynn*, 119 id. 200; *Smith* v. *McDowell*, 148 id. 51; *Pittsburg, Fort Wayne and Chicago Railway Co.* v. *Cheevers*, 149 id. 430; *Chicago General Railway Co.* v. *Chicago, Burlington and Quincy Railroad Co.*, 181 id. 605)."

*City of Chicago* v. *Union Building Association*, 102 Ill. 379, appears to be the primary authority in this line of cases. And in that opinion, which was written by Mr.

Justice Scholfield, the public nuisance flavor strongly appears in the authorities relied upon. Five years later, Mr. Justice Scholfield also wrote the opinion of the court in *McCord* v. *Pike,* 121 Ill. 288, a taxpayer's action to restrain the members of the Board of County Commissioners from executing and delivering a deed conveying property owned by the county. In sustaining the taxpayer's action, he said: "The first question to be considered is, will a bill in equity, by tax-payers, lie in a case like the present? The contention of plaintiff in error is, that such a bill will lie only in the name of the Attorney General, or of the State's attorney of the county, as the representative of the public. In some States, and notably in New York, this is the rule. (See *Roosevelt* v. *Draper,* 23 N.Y. 108.) But the ruling in this State is different. It is here held, that where an unjust and illegal burden is being imposed on the tax-payer by the municipality, or the money or property of the municipality, to replace which taxation must be levied, is being wasted or squandered, the tax-payer has such a direct interest that a bill to enjoin the threatened burden will lie. *Colton* v. *Hanchett,* 13 Ill. 615; *Prettyman* v. *Supervisors,* 19 id. 406; *Perry* v. *Kinnear,* 42 id. 160; *Drake* v. *Phillips,* 40 id. 389; *Chestnutwood* v. *Hood,* 68 id. 132; *Devine* v. *County Commissioners,* 84 id. 590; *Mayor of Springfield* v. *Edwards,* 84 id. 626; *Railroad Co.* v. *People,* 92 id. 170; *Leitch* v. *Wentworth,* 71 id. 147.

"It seems to be supposed that something was said in *Chicago* v. *Building Association,* 102 Ill. 379, contrary to this rule. It is very certain that was not intended, and, we think, if the question there really under consideration be kept in view, and it be also kept in view that the language employed was with reference to that question only, it will appear that nothing there said can reasonably be held to have the effect of announcing a different rule from that sustained by the cases cited *supra.*" 121 Ill. at 290-291.

The distinction between the two lines of cases lies in the fact that in the cases involving misuse, obstructions and encroachments the complaints are "bottomed on the

proposition that the alleged illegal use of the park property was of special injury and damage to his [the plaintiff's] property." (*Carstens* v. *City of Wood River,* 344 Ill. 319, 321-322.) The taxpayer's right to sue does not, however, depend upon any injury to his property. Indeed, he need not be an owner of real property. His right to sue is grounded upon his status as a taxpayer, and it is his equitable interest, as a taxpayer, in the public property which is being illegally disposed of that determines his standing to maintain the action.

In my opinion, neither *Koehler* v. *A Century of Progress* nor *McPike* v. *Illinois Terminal Railroad Co.* can be regarded as overturning the established policy of the State with respect to the rights of taxpayers. That policy had been adhered to by this court throughout the history of the State both before and after those decisions. (See *Bowes* v. *City of Chicago,* (1954) 3 Ill. 2d 175.) That the legislature did not intend that a citizen and taxpayer should be forced to rely solely upon the efforts of public law officers for the protection of public rights is apparent from the statute referred to in the opinion of the majority. And the legislative policy is further illustrated by another statute, enacted in 1871, which allows a taxpayer to sue any person to recover "any money or property belonging to the municipality." Laws of 1871, p. 218, art. X, sec. 4; now Ill. Rev. Stat. 1963, chap. 24, par. 1—5—1.

There is apparently no decision in a taxpayer's action which has squarely involved the disposition of public property of the state, as distinguished from the disbursement of its public funds. But no reason has been suggested to support a distinction between the two situations. *McCord* v. *Pike,* (1887) 121 Ill. 288, held that with respect to local units of government no such distinction should be drawn, and I see no justification for a different conclusion with respect to the funds and property of the State. I would therefore hold that the plaintiff has standing to maintain his action and thus reach the merits.

The plaintiff challenged the validity of S.B. 782 on the ground that it is special legislation in violation of section 22 of article IV of the constitution of Illinois. That section provides: "The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: for—* * * Vacating roads, town plats, streets, alleys and public grounds; * * * Granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever," S.B. 782 unmistakably grants to the United States Steel Corporation the "special or exclusive privilege" of removing materials from the bed of Lake Michigan without paying the statutory charge of 10 cents per cubic yard which the Department of Public Works and Buildings would otherwise be authorized to impose. S.B. 782 also terminates the rights of the public in lands submerged beneath the waters of Lake Michigan and grants those lands to the United States Steel Corporation, and it is thus a special law "vacating public grounds." In my opinion it clearly falls within the constitutional prohibitions against special legislation.

The steel company cited four cases in support of the validity of the statute. The most recent of these, *Smith* v. *Virgin Islands,* (3rd cir. 1964) 329 F. 2d 135, (*cert.* denied 377 U.S. 979, 12 L. Ed. 2d 747,) sustained a grant of public land to a private corporation against an attack upon due process grounds. There is no mention in the opinion of any constitutional provision against special legislation. In *Roberts* v. *Brooks,* (E.D.N.Y. 1896) 71 Fed. 914, (affirmed on other grounds, (2d cir. 1897) 78 Fed. 411,) an act of the New Jersey legislature which granted a private person the right to "erect and maintain" a private dock over State tidal lands was challenged as repugnant to a subsequently enacted provision of the New Jersey constitution "forbidding the grant to any corporation, association, or individual any exclusive privilege, immunity or franchise whatever." Concerning this constitutional provision, the court said: "This would seem to apply to incorporeal things, and not to curtail the right of the legislature to dispose of the state's tangible property; but, if it did, it appears not to have been adopted till 1875—long after this grant." (71 Fed. at 915.) In *First Construction*

*Co. of Brooklyn* v. *State,* (1916) 156 N.Y.S. 911, the appellate division held that a grant to a corporation of lands submerged under tidal waters conformed to a State constitutional provision which authorized the appropriation of "public moneys or property" for private purposes upon the vote of two thirds of the members of each house of the legislature, and therefore did not violate another section of the State constitution which prohibited the grant of an "exclusive privilege, franchise or immunity" to a private corporation. In *Patterson* v. *Trabue,* (1830) 26 Ky. 598, a State legislative grant of land to a private person was sustained against a challenge on the ground that it violated a constitutional provision prohibiting "the granting of exclusive privileges." The court said: "The commonwealth is absolute proprietor over its vacant domain. She may sell it up such terms as she deems fit. * * * "every patent for land grants an exclusive privilege to the patentee * * *."

To the extent that these four decisions bear at all upon the problem before this court, they are certainly not decisive. None of them involves a constitutional prohibition against special legislation "vacating public grounds", and none involves the grant of a special privilege like the privilege to remove fill from the bed of the lake without cost which is granted to the steel company by S.B. 782.

The opinion of the majority does not mention the cases relied upon by the steel company. Instead, it bases its conclusion that S.B. 782 is valid upon what is to me a surprising misreading of the opinion of this court in *People ex rel. Moloney* v. *Kirk,* 162 Ill. 138. That case involved the extension of Lake Shore Drive in Chicago over submerged lands of the State. The extension was to be located more than 1000 feet east of the westerly shore line of the lake. The statute in question authorized the park commissioners to acquire "the riparian or other rights" of the shore owners by purchase or eminent domain, and it also provided that: "* * * in all cases where any boulevard or driveway is extended under the provisions hereof, the submerged lands lying between the shore of such public waters and the inner line of the extension of such

boulevard or driveway shall be appropriated by the board of park commissioners to the purpose of defraying the cost of such extension, and to that end such board of park commissioners are authorized to sell and convey such submerged lands in fee simple, by deeds duly executed on its behalf by its president and under its corporate seal, and every deed executed in pursuance hereof shall vest a good title in the grantee to the premises intended to be conveyed thereby."

Concerning the statute involved in the *Kirk* case, the majority opinion states: "* * * the Board of Park Commissioners was authorized by the statute to execute and make such conveyances *to various shore owners.*" (Emphasis supplied.) But the statute involved in the *Kirk* case did *not* authorize the park commissioners to execute conveyances "to various shore owners." If it had done so, it would have presented the problem raised in the case before us. Instead, it authorized the park commissioners to sell and convey the submerged lands for the purpose of defraying the cost of the extension of Lake Shore Drive.

The opinion of the majority apparently attaches great significance to the fact that in the *Kirk* case the submerged lands were ultimately conveyed to specific grantees. But this fact is of no significance in determining whether or not the legislation authorizing the conveyance is special or general. Every conveyance must run to a specific grantee. The statute in the *Kirk* case neither named nor identified the grantees of the submerged land that was to be reclaimed, whereas the statute in the present case is itself a conveyance to a specific grantee.

The contention that invalidation of this statute as special legislation would cast doubt on titles that rest upon previous conveyances of this type is not convincing. The equitable doctrine of *laches* is applicable to taxpayers' actions, (*Bowman* v. *County of Lake,* (1963) 29 Ill. 2d 268, 280, and if a taxpayer has stood by without asserting his rights until the grantee has proceeded by partial or complete use under the grant, the defense of *laches* would be applicable against the taxpayer and the defense of

estoppel against the public authorities, including the State. See *People ex rel. Prindable* v. *New York Central Railroad Co.*, 400 Ill. 507, 516-18; *Clokey* v. *Wabash Railway Co.*, 353 Ill. 349, 370; *Melin* v. *Community Consolidated School District*, 312 Ill. 376, 383; *State* v. *Illinois Central Railroad Co.*, 246 Ill. 188, 234-5.

The State is not precluded from effectively providing for the disposition of its public grounds. The General Assembly has enacted general statutes providing for the disposition of land of municipal corporations and park districts. (See *e.g.*, Ill. Rev. Stat. 1963, chap. 24, pars. 11—76—1, 2, 3; chap. 105, pars. 10—7, 10—7a-d.) Indeed, general statutory provisions were involved in the two leading cases in which substantial grants of submerged land were sustained by this court. (*People ex rel. Moloney* v. *Kirk*, (1896) 162 Ill. 138; *Bowes* v. *City of Chicago*, (1954) 3 Ill. 2d 175.) The considerations advanced to justify the enactment of S.B. 782—the provision of a substantial base for the imposition of general property taxes, the job creating potential of the proposed use, and the like,—can be taken into account in such legislation.

For example, if the State should decide that it would be in the public interest that a particular parcel of submerged land underlying Lake Michigan be filled in and devoted to some other purpose, the General Assembly might so declare and might offer the submerged lands for development for the use or uses so determined. A conveyance of the land in question to the highest and best bidder, having in view the legislative purpose for which the land is to be filled in, might then be authorized. In such a procedure, it would, of course, be necessary to compensate the abutting owner for the loss of his right of access. But a conveyance resulting from such a procedure would be very different from what is before us—a legislative conveyance to a particular grantee for an unspecified use. Such a conveyance, in my opinion, is exactly what the constitutional provision against special legislation vacating public grounds was designed to prevent.

**Opinion of the Supreme Court of Illinois, filed November 19, 1965:**

Dockets Nos. 38249 and 38905, Cons.—Agenda 54—September, 1965.

Albert C. Droste, Appellant, v. Otto Kerner, Governor, *et al.*, Appellees.

Mr. Justice Schaefer delivered the opinion of the court:

Each of these actions, consolidated in this court, challenges the constitutionality of an act of the General Assembly approved June 26, 1963. (Laws of 1963, (Senate Bill 782) pp. 1229-1231.) By that act, the legislature "granted, quitclaimed and conveyed in fee" to the United States Steel Corporation 194.6 acres of land submerged beneath the waters of Lake Michigan. The statute provided that the grant was to become effective when the Steel Corporation had paid $19,460 to the State Treasurer, and the Chicago Park District had conveyed all its right, title and interest in the submerged lands to the State of Illinois.

The plaintiff, Albert C. Droste, instituted two separate taxpayer actions to enjoin the transfer and sale of the submerged lands. The defendants in each action were the Governor and Secretary of State of Illinois, and the Commissioners of the Chicago Park District. One action (No. 38249) was brought under the statute which relates to actions to enjoin the disbursement of public moneys by officers of the state, (Ill. Rev. Stat. 1963, chap. 102, pars. 11—16) and in accordance with the statute that action was commenced by filing a petition for leave to file a complaint. Leave to file the complaint was denied, and the plaintiff appealed.

The other action (No. 38905) was instituted because of the plaintiff's doubt as to the applicability of the statute relating to taxpayer's actions, since that statute refers to the disbursement of "public moneys" and "public funds", and does not mention the conveyance of public property. In this action the plaintiff alleged the invalidity of S.B. 782

and sought an injunction to restrain the conveyance, a declaration of the invalidity of S.B. 782, and a writ of *mandamus* to compel the defendants to seek a judicial determination of the legality of the proposed conveyance before the conveyance should be made. The defendants filed motions challenging the standing of the plaintiff to maintain the action and answers asserting the validity of S.B. 782. United States Steel Corporation sought and obtained leave to intervene in this action. Its answer described its situation as the owner of all the shore and upland immediately adjacent to the submerged land in question, asserted the validity of S.B. 782 and challenged the plaintiff's standing to maintain his action. In this case the parties elected to offer no proof, and the court considered the action as pending upon a motion for judgment on the pleadings. After hearing argument, the court found that S.B. 782 was valid, and dismissed the complaint for want of equity. The plaintiff has appealed.

In each case plaintiff's standing to maintain the action was challenged in the trial court and the challenge is renewed in this court. We turn at once to a consideration of that issue. As to the statutory action, which allows "any citizen and taxpayer" to enjoin the disbursement of public funds or public moneys, it is argued that the statute does not embrace actions to enjoin the disposition of public property. And as to the other action, it is argued that no citizen and taxpayer may seek to enjoin illegal official action unless he shows some "special injury", not common to the public generally.

Illinois has long recognized the right of a citizen and taxpayer to sue in equity to enjoin the misappropriation of public funds. In *Colton* v. *Hanchett,* 13 Ill. 615, (1852) a taxpayer was permitted to sue to enjoin the county Board of Supervisors from illegally disbursing county revenue, because the case involved "a question affecting the public interest" and because no other remedy was as "direct, speedy and efficacious." And in *City of Springfield* v. *Edwards,* 84 Ill. 626, (1877) the court sustained an injunction to restrain the incurring of municipal indebtedness in violation of the

constitutional debt limit, saying: "We may dismiss the objection that the complainant does not show in his bill that he is injured by the acts complained of, otherwise than in common with all other tax-payers in the city, with the observation that it has been held in this State that such an injury is sufficient to entitle him to an injunction, and that the question is not open to further discussion. *Colton et al.* v. *Hanchett et al.* 13 Ill. 615; *Perry et al.* v. *Kinnear et al.* 42 id. 160; and *Beauchamp* v. *Board of Supervisors, etc.* 45 id. 274." 84 Ill. at 631.

In 1887 the doctrine that had previously been applied to illegal expenditures of public funds was applied to the illegal disposition of public land. In *McCord* v. *Pike,* 121 Ill. 288, the court held that a taxpayer's bill in equity would lie to restrain the board of county commissioners of Cook County from illegally executing and delivering a deed conveying property of the county. The court said: "The first question to be considered is, will a bill in equity, by taxpayers, lie in a case like the present? The contention of plaintiff in error is, that such a bill will lie only in the name of the Attorney General, or of the State's attorney of the county, as the representative of the public. In some States, and notably in New York, this is the rule. (See *Roosevelt* v. *Draper,* 23 N.Y. 108.) But the ruling in this State is different. It is here held, that where an unjust and illegal burden is being imposed on the taxpayer by the municipality, or the money or property of the municipality, to replace which taxation must be levied, is being wasted or squandered, the taxpayer has such a direct interest that a bill to enjoin the threatened burden will lie. *Colton* v. *Hanchett,* 13 Ill. 615; *Prettyman* v. *Supervisors,* 19 id. 406; *Perry* v. *Kinnear,* 42 id. 160; *Drake* v. *Phillips,* 40 id. 389; *Chestnutwood* v. *Hood,* 68 id. 132; *Devine* v. *County Commissioners,* 84 id. 590; *Mayor of Springfield,* v. *Edwards,* 84 id. 626; *Railroad Co.* v. *People,* 92 id. 170; *Leitch* v. *Wentworth,* 71 id. 147." 121 Ill. at 290, 291.

The cases thus far discussed involved illegal disposition of the funds or property of counties and other units of local government, but in *Littler* v. *Jayne,* 124 Ill. 123, (1888) the

court applied the same doctrine to the misuse of state assets. In this case a state taxpayer sought to enjoin the State House Commissioners from approving vouchers which would have led to the expenditure of funds under an illegal contract. Without prolonged discussion, and upon the authority of the local government cases, the propriety of the action was sustained. See also *Burke* v. *Snively,* 208 Ill. 328, (1904).

In 1915 the court decided *Jones* v. *O'Connell,* 266 Ill. 443, and *Fergus* v. *Russel,* 270 Ill. 304. In the *Jones* case a taxpayer brought an action to restrain the county treasurer of Cook County from illegally retaining a percentage of inheritance taxes which he would collect in the future, and to compel him to pay over to the state treasurer amounts he had illegally retained in the past. In sustaining the plaintiff's right to equitable relief, the court said: "If taxpayers have a right or interest which the bill in this case was intended to protect it is of a purely equitable nature, the legal right and title being in the State. If the defendant, O'Connell, has money in his hands which he has no right to retain but which he is bound to pay to the State treasurer, the sum retained by him must be made up by taxation, and every tax-payer has an equitable right to see that the money so unlawfully retained shall be paid to the State treasurer for the use of the State. This court has always recognized that rule and has uniformly held that the taxpayers are in equity the owners of the property of a municipality, and whenever public officials threaten to pay out public funds for a purpose unauthorized by law or misappropriate such funds, equity will assume jurisdiction to prevent the unauthorized act or to redress the wrong, and this is because the right and interest are equitable in their nature and are not recognized by courts of law." 266 Ill. at 447.

In *Fergus* v. *Russel,* the underlying basis of the taxpayer's suit was again articulated. There a state taxpayer sued to enjoin the payment of a number of legislative appropriations. The court said "We have repeatedly held that

tax-payers may resort to a court of equity to prevent the misapplication of public funds, and that this right is based upon the tax-payers' equitable ownership of such funds and their liability to replenish the public treasury for the deficiency which would be caused by the misappropriation. * * * Upon principle and reason we perceive no distinction between the right of a taxpayer to enjoin the misappropriation of public funds from a municipal treasury and the right to enjoin an invalid appropriation of the public funds from the State treasury." 270 Ill. at 314, 315.

In 1917, shortly after *Jones* v. *O'Connell* and *Fergus* v. *Russel* were decided, the General Assembly adopted "An Act in relation to suits to restrain and enjoin the disbursement of public moneys by officers of the State." (Laws of 1917, p. 534, sec. 1.) This act affirmed the existing rule. It provides that either the Attorney General or "any citizen and taxpayer of the State" may sue in equity to "enjoin the disbursement of public funds" by any officer of the state. (Ill. Rev. Stat. 1963, chap. 102, par. 11.) Section 4 of the act, however, establishes a screening procedure whereby a citizen and taxpayer suitor must obtain leave of court before he may file a complaint under the act. The defendants and the Attorney General are notified, and the court determines upon a hearing whether there is reasonable ground for filing the suit. (Ill. Rev. Stat. 1963, chap. 102, par. 14.) The purpose of this statute was described in *Hill* v. *County of LaSalle,* 326 Ill. 508, 515, (1927): "Prior to the enactment of the statute a tax-payer might institute, as a matter of right, a suit to restrain State officers, as well as other public officers, from disbursing public funds. These suits were often well founded, but when prosecuted for some ulterior or malicious purpose they might, and sometimes did, seriously embarrass the proper administration of public affairs. When the right of a public officer charged with the duty and responsibility of the proper application of public funds to disburse such funds is challenged by a lawsuit, it is obvious that for his own protection he will refuse to pay out the money in his custody until the suit is finally adjudicated. Hence the General Assembly, as a check upon

the indiscriminate institution of such suits, provided by the act of June 21, 1917, that when a tax-payer seeks to enjoin a State officer from disbursing public funds, he must by a petition show that there is reasonable ground for filing the bill and obtain leave for that purpose. The act provides a summary proceeding to determine whether a bill in equity to enjoin the disbursement of public moneys by State officers is justified and should be filed, and by that proceeding seeks to prevent unwarranted interference with the performance of certain public duties."

The defendants concede that this statute grants citizens and taxpayers the right to enjoin the disbursement of public money, but they argue that the conveyance of submerged lakefront land involved here does not fit the statutory terms "public funds" and "public moneys." Therefore, they say, in the absence of proof of special injury to the plaintiff not suffered by the public at large, only the Attorney General may challenge the legality of the proposed conveyance. And with respect to the plaintiff's other action, which was not brought under the statute, the defendants contend that it cannot be maintained because no special injury to the plaintiff was shown.

To support the latter position the defendants rely upon *Koehler* v. *Century of Progress,* 354 Ill. 347, (1934), *McCormick* v. *Chicago Yacht Club,* 331 Ill. 514, (1928), *Fletcher* v. *City of Paris,* 377 Ill. 89, (1941), and *Payne* v. *Emmerson,* 290 Ill. 490, (1919). The last two of these cases, *Fletcher and Payne,* involved taxpayer actions to enjoin the expenditure of public funds. In each case, however, the expenditure was to be made in conducting a referendum election, and the right of the taxpayer was subordinated to the settled doctrine that equity will not entertain jurisdiction to enjoin such an election. *Koehler* v. *Century of Progress* did not involve any expenditure of public funds, as the court pointed out, saying: "Illegal expenditure of public funds may always be said to involve a special injury to the taxpayer not suffered by the public at large." 354 Ill. at 350.

On the surface, *McCormick* v. *Chicago Yacht Club,* 331 Ill. 514, (1928) appears to support the defendant's position, for in that case the plaintiff's action to restrain construction of the yacht club on submerged lands was dismissed for want of standing. The *McCormick* case, however, was not a taxpayer's action. The plaintiff grounded his right to sue upon his position as the owner of land abutting a public park which, under the terms of its dedication, was to "forever remain vacant of buildings." Moreover, the briefs of the parties did not discuss the question of the standing of the plaintiff to maintain the action. That issue was raised by the court *sua sponte.*

Uponothat issue the court said (p. 521): "The individual has no standing in equity on account of public injury. He can invoke that jursidiction only to protect his property from threatened injury, and since the property owner has a complete remedy at law for any injury to his property, a court of equity will not, upon the allegation that the supposed authority for the construction complained of is illegal, enjoin the defendant from proceeding. The misuse of public property which does not result in special injury to the individual cannot be complained of except by the people. A private individual cannot maintain a bill to enjoin a breach of public trust, in the absence of statutory authority, without showing that he will be specially injured thereby. *City of Chicago* v. *Union Building Ass'n,* 102 Ill. 379; *Doane* v. *Lake Street Elevated Railroad Co.* 165 id. 510; *General Electric Railway Co.* v. *Chicago and Western Indiana Railroad Co.* 184 id. 588; *Hamilton* v. *Semet Solvay Co.* 227 id. 501; *Hill* v. *St. Louis and Northeastern Railway Co.* 243 id. 344; *McPike* v. *Illinois Terminal Railroad Co.* 305 id. 298; *Hartshorn* v. *Bierbom,* 312 id. 275."

The court did not mention any of the host of its decisions that have sustained taxpayer's actions. Nor did it take into account the fact that *City of Chicago* v. *Union Building Association,* 102 Ill. 379 (1882), from which the line of authority relied upon by the court largely derived, had long since been distinguished from the taxpayers' cases.

In *McCord* v. *Pike*, 121 Ill. 288 (1887), the court said, in a passage immediately after that which was quoted above, (p. .....) : "It seems to be supposed that something was said in *Chicago* v. *Building Association*, 102 Ill. 379, contrary to this rule. It is very certain that was not intended, and, we think, if the question there really under consideration be kept in view, and it be also kept in view that the language employed was with reference to that question only, it will appear that nothing there said can reasonably be held to have the effect of announcing a different rule from that sustained by the cases cited *supra*." 121 Ill. at 291.

Of the other six decisions cited as authority in *McCormick* v. *Chicago Yacht Club*, only one, *McPike* v. *Illinois Terminal Railroad Co.* 305 Ill. 298 (1922), was a taxpayer's action. In that case the plaintiff sought to enjoin the city from issuing to the railroad a franchise over a portion of public ground which the plaintiff sought to hold under an invalid prior lease. He also urged that as a citizen and taxpayer he had the right to enjoin the proposed use of the public commons. The court pointed out that the bill alleged no special damage to the plaintiff, and held that the plaintiff had no right to an injunction "under the averments of his bill." The authorities cited in the *McPike* case do not support the proposition that an allegation of special injury is necessary to support a taxpayer's action. One, *City of Chicago* v. *Union Building Ass'n*, 102 Ill. 379, (1882) had been distinguished. Three, *Ochler* v. *Levy*, 234 Ill. 595, (1908), *Guttery* v. *Glenn*, 201 Ill. 275, (1903) and *McDonald* v. *English*, 85 Ill. 232, (1877), were suits by property owners to enjoin the maintenance of public nuisances in the streets or on nearby property and were decided solely with reference to the "well settled" doctrine "that a public nuisance will not be restrained at the suit of a private person, unless such person suffers therefrom a special and particular injury * * *." (*Guttery* v. *Glenn*, 201 Ill. 275, 290.) The last, *Hamilton* v. *Semet Solvay Co.* 227 Ill. 501, (1907), was premised upon allegations of damage to the plaintiff's property and public nuisance, and the court relied mainly on *McDonald, Guttery* and *Union Building Association.*

Neither *McCormick* v. *Chicago Yacht Club* nor *McPike* v. *Illinois Terminal R.R. Co.* can be regarded as overturning the established policy of the state with respect to the rights of citizens and taxpayers. That policy has been adhered to by this court throughout the history of the state both before and after those decisions. (See *Haas* v. *Commissioners of Lincoln Park,* 339 Ill. 491, (1930).) That the legislature did not intend that a citizen and taxpayer should be forced to rely solely upon the efforts of public law officers for the protection of public rights is apparent from the taxpayers' statute. And the legislative policy is further illustrated by another statute, enacted in 1871, which allows a taxpayer to sue any person to recover "any money or property belonging to the municipality." Laws of 1871, p. 218, art. X, sec. 4; now Ill. Rev. Stat. 1963, chap. 24, par. 1—5—1.

There is apparently no decision in a taxpayer's action which has squarely involved the disposition of public property of the state, as distinguished from the disbursement of its public funds. But no reason has been suggested to support a distinction between the two situations. *McCord* v. *Pike,* 121 Ill. 288, held that with respect to local units of government no such distinction should be drawn, and we see no justification for a different conclusion with respect to the funds and property of the state. To the extent that anything said in *McCormick* v. *South Park Commissioners* and *Pike* v. *Illinois Terminal Railroad Company* might be thought to establish a requirement of special injury in actions by citizens and taxpayers, those decisions are not adhered to. Both in precedent and in policy the disposition of the state's public property and the disposition of its public funds stand upon an equal footing. We hold that, apart from the statute, plaintiff had the requisite standing to maintain his action.

In a sense, this determination makes unnecessary further discussion of the plaintiff's standing to maintain the action that he attempted to institute under the taxpayers' statute. (Ill. Rev. Stat. 1963, chap. 102, pars. 11—16.) But the procedural control upon frivolous actions which the statute affords is equally desirable whether the action involves pub-

lic moneys or public property. We therefore conclude that full implementation of the purpose of the statute indicates that the screening procedure which it established should apply to both types of claims.

On the merits, the plaintiff challenges the validity of S.B. 782 on the ground that it is special legislation in violation of article IV, section 22 of the constitution of Illinois. That section provides: "The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: for—* * * Vacating roads, town plats, streets, alleys and public grounds; * * * Granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever." S.B. 782 authorizes the conveyance of a specific tract of land submerged beneath the waters of Lake Michigan to a specific grantee, the United States Steel Corporation. In our opinion it clearly falls within the constitutional provision which prohibits special legislation. Indeed, the defendants do not really argue that the statute is not special legislation; rather they contend that it is in effect a conveyance, and since a conveyance must run to someone, a legislative conveyance must always be special. But this argument, if accepted, would substantially nullify the constitutional provision.

The contention that invalidation of this statute as special legislation would cast doubt on titles that rest upon previous conveyances of this type is not convincing. The equitable doctrine of *laches* is applicable to taxpayers' actions, (*Bowman* v. *County of Lake*, 29 Ill. 2d 268, 280, (1963) and if a taxpayer has stood by without asserting his rights until the grantee has proceeded under the grant, the defense of *laches* would be applicable. Nor is the state barred by our decision from effectively providing for the disposition of its public grounds. The General Assembly has enacted general statutes providing for the disposition of land of municipal corporations and park districts. (See *e.g.* Ill. Rev. Stat. 1963, chap. 24, par. 11—76—1, 2, 3; chap. 105, pars. 10-7, 10—7a-d.) The factors mentioned by the defendant as justifying the enactment of S.B. 782—the provision of a

substantial base for the imposition of general property taxes, the job creating potential of the proposed use, and the like,—can be taken into account in such legislation.

We can not disregard the flat prohibition of the constitution. The decrees of the superior court of Cook County are reversed.

*Decrees reversed.*

---

**Opinion of the Supreme Court of Illinois, filed May 20, 1965:**

Dockets Nos. 38249, 38905, cons.—Agenda 22—January, 1965.

Albert C. Droste, Appellant, v. Otto Kerner, Governor, *et al.*, Appellees.

Mr. JUSTICE HERSHEY delivered the opinion of the court:

This consolidated cause arises from the action of Albert C. Droste against the Governor and Secretary of State of the State of Illinois and certain commissioners of the Chicago Park District, in the superior court of Cook County, seeking leave to file a statutory taxpayer's suit under the Public Moneys Act relating to suits to enjoin disbursement of public moneys, (Ill. Rev. Stat. 1963, chap. 102, pars. 11-16,) attacking a grant by the Illinois legislature of 194 acres of submerged public lands under Lake Michigan to the United States Steel Corporation under an act approved June 26, 1963, (hereafter referred to as S.B. 782), and from the separate action of Albert C. Droste as a taxpayer filed in the circuit court of Cook County against the same defendants in which United States Steel Corporation is an intervenor, based upon a common-law taxpayer's action for declaratory judgment and injunction seeking to prevent defendants from carrying out the provisions of such statute.

The superior court denied the petition for leave to file the statutory action in No. 38249 and the circuit court of Cook County in No. 38905 entered an order on the plead-

ings that the merits of the cause required the complaint be dismissed for want of equity and entered judgment for defendants. The causes have been consolidated in this court since the same original parties and the same general common subject matter is involved in both cases.

Both cases involve an attack on the act of June 26, 1963, (Laws of 1963, pp. 1229-1231). By this act, the General Assembly of the State of Illinois granted, quitclaimed and conveyed to United States Steel Corporation, its successors and assigns, some 194.60 acres of land submerged beneath the waters of Lake Michigan upon payment to the Treasurer of the State of Illinois by United States Steel Corporation of the sum of $19,460 and upon the Chicago Park District conveying to the State of Illinois all of its right, title and interest in said property, and with the placement of fill on such land required to be in compliance with "An Act in relation to the regulation of the rivers, lakes, and streams of the State of Illinois", approved June 10, 1911, as amended, with certain specified exceptions. Ill. Rev. Stat. 1963, chap. 19, par. 52 *et seq.*

The question presented in the superior court in cause No. 38249 was whether that suit concerned the "disbursement of public funds by any officer or officers of the State government" within the terms of the Public Moneys Act. The trial court held that the complaint concerned the granting of State property and did not fall within the terms of said statute since "public funds" were not "disbursed" by it.

In the case filed in the circuit court in cause No. 38905, a common-law taxpayer's suit challenged the validity of the act, alleging that defendants propose to make expenditure of public funds in, among other things, preparing and obtaining economic surveys and materials, land surveys and materials, title reports, land-use plans, models, maps and other charges, in carrying out the grant of public lands to the United States Steel Corporation for its private use and enjoyment, which plaintiff contends is unconstitutional and invalid and beyond the power of the legislature to enact. It alleged that the defendants seek to act pursuant to such illegal statute and that the Attorney General of the

State of Illinois, State's Attorney of Cook County and Corporation Counsel of the City of Chicago have refused to take action to present and have determined the legality of such grant, although requested in writing by plaintiff to do so. Said complaint contends that the grant for no consideration to the Chicago Park District and a *de minimis* consideration to the State is a misappropriation of a public asset of the citizens and taxpayers of the State and dissipation of the assets of a public trust. Plaintiff prayed for a declaration that S.B. 782 was invalid and for an injunction restraining defendants from proceeding to carry out said statute and for *mandamus* that defendants were not to make a conveyance and to seek and obtain a judicial determination of the legality of such conveyance.

The Public Moneys Act deals with the subject of "Enjoining Disbursements of Public Moneys", and permits the court or judge to grant the petition and permit complaint to be filed upon the showing of reasonable ground therefor. However, the language of the act and the prior decisions of this court limit the use of an act to enjoining the use of public funds—"public moneys". There is no intention shown to extend such actions to a case involving conveyance of real estate. We conclude that the Public Moneys Act was never designed nor intended to enjoin the legislative grant of real estate and that the superior court of Cook County was correct in refusing to grant leave to file the complaint in cause No. 38249.

Cause No. 38905 was filed in the circuit court of Cook County as a taxpayer's suit seeking to enjoin defendants as public officials from doing any acts which directly or indirectly would cause conveyance of the submerged lands to or for the benefit of the United States Steel Corporation pursuant to S.B. 782 on the theory that the conveyance of these lands violates the public trust doctrine laid down in *Illinois Central Railroad Co.* v. *Illinois*, 146 U.S. 387, 36 L. ed. 1018, and followed by this court in *People ex rel. Moloney* v. *Kirk*, 162 Ill. 138 (1896). Defendants filed motions to dismiss, contending that plaintiff failed to allege

facts showing any special injury or damage to himself different in degree and kind from that which he alleges the general public will suffer, and that in the absence of any such special injury or damage, plaintiff as a taxpayer could not maintain a suit to enjoin public officials. It is also contended that plaintiff failed to allege any facts showing that his taxes would be increased if the conveyance is carried out in compliance with S.B. 782. The trial court denied these motions. Thereafter, defendant United States Steel Corporation was permitted to intervene as a defendant, and in its answer it asserted these matters as affirmative defenses.

At the outset, in a common-law action brought as a taxpayer to enjoin a breach of public trust, the plaintiff must show, among other essential allegations, that he is specially injured by the purported misuse of public property. Thus, in *Koehler* v. *A Century of Progress,* 354 Ill. 347 (1933), where a taxpayer sought to enjoin officials from disposing of an interest in land near Lake Michigan, this court held the taxpayer did not have a sufficient interest to bring the suit. There we stated that "An obstruction or mis-use of public property which does not result in special injury to the individual cannot be complained of except by the people. To entitle a tax-payer to maintain a bill to enjoin a breach of public trust, he must, in the absence of statutory authority conferring such right, show that he is specially injured thereby. An individual has no standing in equity on account of an injury to the public by the mis-use of property held in trust for the public. He is entitled to invoke equitable jurisdiction only to protect his property from threatened injury, and unless it is shown that he will suffer special damage, different in degree and kind from that suffered by the public at large, he will not be heard to complain of misuse of public property." The same rule was earlier laid down in *McCormick* v. *Chicago Yacht Club,* 331 Ill. 514, where abutting landowners sought to enjoin the club from constructing a building on reclaimed lake frontage. In that case, plaintiffs were abutting landowners, while in the instant case plaintiff resides several miles from the site of the proposed reclamation.

In his amended complaint, plaintiff has alleged no facts establishing special injury to himself, different in degree or kind from that allegedly suffered by the general public. The amended complaint alleges only conclusions and expresses plaintiff's general disagreement with the policy expressed by the statute. Such circumstances as are alleged by plaintiff fall far short of meeting the requirement of "special injury to himself."

While plaintiff does allege that there will be expenditures of public funds in the carrying out of the statute, such as preparing and obtaining economic surveys, land surveys, title reports, land-use plans, models and maps, and expenses of recording, mail, telephones and telegrams, such expenditures, in addition to being conjectural, are *de minimis*. Such expenditures are too trifling to be reflected in plaintiff's tax bills. (*Payne* v. *Emmerson*, 290 Ill. 490.) Further, the allegations that this statute will cause the city of Chicago and the State of Illinois to make large expenditures of public funds for public improvements or services are purely conjectural and unsupported by any provisions in this act. These allegations wholly fail to show unauthorized expenditures of public funds and particularly any which would cause special injury to the plaintiff, or even that there would be an increase in his taxes, as he is required to show to maintain such a suit. Accordingly, cause 38905 was properly dismissed for failure of the plaintiff to allege facts showing his right to maintain the action.

The matters persuade us that the judgments of the courts below should be affirmed.

*Judgments affirmed.*

## APPENDIX B.

**Senate Bill 782, Seventy-Fourth Illinois General Assembly, approved June 26, 1963 (Laws of Illinois, 1963, pp. 1229-1231):**

A BILL

For an Act for the sale to United States Steel Corporation of the interest of the State of Illinois in certain lands.

*Be it enacted by the People of the State of Illinois, represented in the General Assembly:*

Section 1. It is hereby declared that the grant of submerged land contained in this Act is made in aid of commerce and will create no impairment of the public interest in the lands and waters remaining, but will instead result in the conversion of otherwise useless and unproductive submerged land into an important commercial development to the benefit of the people of the State of Illinois.

Section 2. The right, title and interest of the State of Illinois in and to the following described land, now or heretofore submerged beneath the waters of Lake Michigan, is hereby granted, quitclaimed and conveyed in fee to United States Steel Corporation, its successors and assigns, to-wit:

Beginning at the intersection of two lines, one of such lines being parallel to and twenty-two (22) feet south of the south line of Seventy-ninth Street extended in the City of Chicago, and the other of such lines being the shore line of Lake Michigan as it existed at the date of the enactment of an act entitled "An Act providing for the sale to the Illinois Steel Company of the interest of the State of Illinois in certain lands", approved June 15, 1909, in force July 1, 1909, and running thence from the point of intersection aforesaid north eighty-eight (88) degrees fifty-seven (57) minutes east to a point which

is one thousand one hundred twenty-three and fifty-six one-hundredths (1,123.56) feet east of the west line of Section Thirty-two (32), Township Thirty-eight (38) North, Range Fifteen (15) East of the Third Principal Meridian, (the south line of Seventy-ninth Street aforesaid being thirty-three (33) feet south of the north line of said Section Thirty-two (32)); thence south eighty-eight (88) degrees thirty (30) minutes east five hundred fourteen and eighty-six one-hundredths (514.86) feet; thence south eighty-eight (88) degrees thirty (30) minutes east fifty-four and twenty-four one-hundredths (54.24) feet; thence south sixty-one (61) degrees thirty (30) minutes east four hundred five and twenty-five one-hundredths (405.25) feet; thence north twenty-eight (28) degrees thirty (30) minutes east fifty (50) feet to the northeasterly boundary line of the tract of land described in the Act aforesaid; thence south sixty-one (61) degrees thirty (30) seconds east Two thousand five hundred ninety-seven (2597.00) feet along said northeastern boundary to the northeasterly corner of the tract of land described in said Act; thence southerly along the easterly boundary line of said tract to the north line of the United States Government northerly breakwater of Calumet Harbor at the north side of the entrance to United States Steel Corporation's north slip; thence easterly along said north line of breakwater to the boundary line between the States of Illinois and Indiana; thence northerly along said boundary line to a point formed by its intersection with the said south line of Seventy-ninth Street extended easterly; thence Westerly along said south line of Seventy-ninth Street extended easterly to its intersection with the shore line of Lake Michigan as it existed at the time of the enactment of the Act aforesaid; thence southerly along said shore line of Lake Michigan as it existed at such time to the point of beginning, in Cook County, Illinois; containing 194.60 acres, more or less; provided, however, that this grant shall not become effective until

(a) the sum of $19,460.00 has been paid to the Treasurer of the State of Illinois by United States Steel Corporation or any legal successor thereto, and

(b) the Chicago Park District has conveyed to the State of Illinois all its right, title and interest in and to the real estate described herein and the deed making such conveyance has been duly recorded in the Office of the Recorder of Deeds in Cook County, Illinois.

Section 3. After fulfillment of the conditions contained hereinabove, a patent shall be issued under the great seal of the State by the Governor and Secretary of State to United States Steel Corporation, its successors and assigns, evidencing the grant herein contained of those certain tracts, pieces or parcels of land hereinabove described.

Placement of fill on the land described in this Act shall be subject to the provisions of "An Act in relation to the regulation of the rivers, lakes, and streams of the State of Illinois," approved June 10, 1911, as amended, except that the payment of 10 cents per cubic yard which the Department of Public Works and Buildings may require under Section 18a of that Act, for materials removed from the bed of Lake Michigan by United States Steel Corporation or its agents is hereby waived.

## APPENDIX C

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## ORDERS OF THE CIRCUIT COURT OF COOK COUNTY AND THE SUPREME COURT OF ILLINOIS

---

### ORDER OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

**Dated October 22, 1963**

(Statutory Action)

(Caption Omitted)

The petition for leave to file the taxpayer's complaint attached to that petition, having been fully considered, is denied.

Enter:

/s/ Arthur A. Sullivan
Judge

## ORDER OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

(Common Law Action)

(Caption Omitted)

This matter having come on for hearing; the Court considering as a matter of law, and all parties electing to offer no further proof thereon, whether the Legislature had the power to pass the Act of June 26, 1963; the Court having heard counsel; and the Court being fully advised in the premises;

The Court Finds, as a matter of law that under the Constitution and laws of Illinois, including Article IV, Section 22 of the Illinois Constitution, that the Legislature had the power to pass the legislation in question, and that the Act of June 26, 1963 is valid.

Now, Therefore, It Is Ordered that:

The Amended Complaint is dismissed on the merits for want of equity and judgment herein is entered for defendants.

Dated: June 10, 1964

Enter:

/s/ John J. Lupe
Judge

## ORDER OF THE SUPREME COURT OF ILLINOIS

**Dated Mar. 24, 1966**

**Re: Case No. 38249**

(Caption Omitted)

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the decree aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the decree of the Circuit Court of Cook County (Chancery Division) aforesaid, Be Affirmed In All Things And Stand In Full Force And Effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellees recover of and from the said appellant costs by them in this behalf expended, to be taxed, and that they have execution therefor.

## ORDER OF THE SUPREME COURT OF ILLINOIS

**Dated March 24, 1966**

**Re: Case No. 38905**

(Caption Omitted)

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the decree aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the decree of the Circuit Court of Cook County (Chancery Division) aforesaid, Be Affirmed In All Things And Stand In Full Force And Effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellees recover of and from the said appellant costs by them in this behalf expended, to be taxed, and that they have execution therefor.

## ORDER OF THE SUPREME COURT OF ILLINOIS

**Dated May 18, 1966**

(Caption Omitted)

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.

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# In the Supreme Court of the United States

OCTOBER TERM, 1966.

ALBERT C. DROSTE,
*Plaintiff-Appellant,*
*vs.*

OTTO KERNER, Governor of the State of Illinois, WILLIAM CHAMBERLAIN, Secretary of State of the State of Illinois, and JAMES H. GATELY, WILLIAM L. McFETRIDGE, JACOB M. ARVEY, JOHN LEVIN and JOSEPH L. GILL, Commissioners of the Chicago Park District, a municipal corporation, and UNITED STATES STEEL CORPORATION, Intervenor,
*Defendants-Appellees.*

On Appeal From The Supreme Court of Illinois.

## MOTION TO DISMISS ON BEHALF OF UNITED STATES STEEL CORPORATION

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*Of Counsel.*

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

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## *No. 671*

---

ALBERT C. DROSTE,

*Plaintiff-Appellant,*

*vs.*

OTTO KERNER, Governor of the State of Illinois, WILLIAM CHAMBERLAIN, Secretary of State of the State of Illinois, and JAMES H. GATELY, WILLIAM L. McFETRIDGE, JACOB M. ARVEY, JOHN LEVIN and JOSEPH L. GILL, Commissioners of the Chicago Park District, a municipal corporation, and UNITED STATES STEEL CORPORATION, Intervenor,

*Defendants-Appellees.*

---

On Appeal From The
Supreme Court of Illinois.

---

## MOTION TO DISMISS ON BEHALF OF UNITED STATES STEEL CORPORATION

---

Appellee United States Steel Corporation moves that the Court dismiss this appeal. The judgments of the Supreme Court of Illinois were based solely on state law

grounds. The supposed federal questions sought to be reviewed were not properly raised or expressly passed on below.

## JURISDICTION

The jurisdiction of this Court was invoked under 28 U.S.C. § 1257(2). Jurisdiction fails at the threshold, however.

No order or opinion by any of the courts below—including the dissenting opinion filed by one of the Illinois Supreme Court judges—treated with any issue of federal law whatever. (See this Motion, 15-16.)

In the Illinois courts, the appellant never at any time made a claim that the Illinois statutory or decisional law on a taxpayer's standing to sue denied him equal protection. (See this Motion, 17-20.) He made no mention of federal due process or of any specific federal due process theory, not even in his second Petition for Rehearing after the final opinion of the Illinois Supreme Court. ( See this Motion, 17-20.)

In the courts below, the appellant relied *expressly and solely on state law theories.* He contended that the Illinois legislature had no power to enact the legislation in question, Illinois S.B. 782, because it violated (1) the basic public trust doctrine of Illinois* pertaining to submerged lands

---

* The public trust doctrine is expressed by the Illinois Supreme Court in the instant case (J. S. 3a) as follows:

> "It was well settled, prior to the constitution of 1870, that subject to the paramount power of the Federal government over commerce, including navigation, title to the lands submerged by the waters of Lake Michigan lying within the boundaries of Illinois rested in the State of Illinois in trust to protect the rights of the public in the use of those navigable waters for fishing, boating, recreation and other public purposes.

as applied by prior Illinois court decisions, and (2) various clauses of the Illinois Constitution, particularly Article IV, Section 22, which prohibits certain categories of special legislation. Throughout his briefs and arguments he emphasized that Illinois was free to adopt its own doctrines concerning submerged lake front land because this is "a question of local law with regard to which the decisions of the state courts are conclusive". (R. 62:25.)

Now, searching for a federal question, he relies upon certain language in *Illinois Central Railroad* v. *Illinois* (146 U.S. 387), the *Lake Front* case. But in the courts below he distinguished that case and argued that the Illinois courts had "expressly repudiated" the *Lake Front* case. (R. 62:26.) He is precluded from changing theories to create jurisdiction at this point. (E.g., *Dewey* v. *Des Moines,* 173 U.S. 193, 197-198.)

Moreover, his new claim of *denial* of supposed federal equal protection rights should be pursued by certiorari under 28 U.S.C. §1257(3), and not by appeal. (E.g., *Hanson* v. *Denckla,* 357 U.S. 235, 244.) Aside from being unfounded and untimely, the appellant's claim that the state's requirement of standing to sue denies him equal

---

* (Continued)

This did not mean, however, that the shoreline was required forever to remain unchanged except by natural causes. An equally important part of the doctrine was that the State might from time to time relinquish its trust as to specific parcels of submerged lands by action of the General Assembly in granting to a shore owner title to those lands adjacent to his property *where the grant was in aid of commerce and where the public interest in the lands and waters remaining was not substantially impaired. Illinois Central Railroad Co.* v. *Illinois,* 146 U. S. 387, 36 L. Ed. 1018, and authorities cited." (Emphasis added.)

protection is not a claim which has anything to do with the validity or invalidity of S.B. 782, the Illinois act challenged here. This supposed denial of equal protection to the appellant is not a challenge to the validity of S.B. 782. It is not a challenge *to the statute* as against which the validity of the statute has been sustained within the meaning of 28 U.S.C. § 1257(2). The equal protection claim is plainly a matter to be considered under 28 U.S.C. § 1257(3) and the standards applicable to certiorari. (E.g., Rule 19.) See *Hickey* v. *Illinois Central Railroad* (278 F. 2d 529, *cert. den.* 364 U.S. 918), a recent case involving Chicago lake front property subject to the public trust doctrine, where the Seventh Circuit denied taxpayer plaintiffs standing to sue, and concluded "the case is not within the jurisdiction of the federal courts." (278 F.2d 529, 532.)

## QUESTIONS PRESENTED

1. Does state law or federal law govern a state's exercise of power to dispose of state-owned submerged land by legislation which the state courts have found to be in compliance with the public trust doctrine?

2. Do the Illinois rules regarding a taxpayer's standing to sue deny equal protection to the appellant on this record, where the state courts ruled on the merits of the appellant's substantive contentions which involved only matters of state law?

3. Were the appellant's supposed federal questions properly raised or expressly passed on below?

## ARGUMENT

### I. The Courts Below Decided No Federal Questions.

#### A. The Appellant's Reliance Upon The Lake Front Case Is Flatly Contrary To His Theory Below.

In the trial court and in the Illinois Supreme Court the appellant did not base his public trust argument on the *Lake Front* case (*Illinois Central Railroad* v. *Illinois,* 146 U.S. 387), or upon federal law. There he relied upon an Illinois Supreme Court decision (*Illinois Central Railroad* v. *Chicago,* 173 Ill. 471, *aff'd* 176 U.S. 646) decided under state law. He argued that the rationale of this Court's *Lake Front* decision had been "expressly rejected" by the Illinois court. (R. 62:6.) He argued that the Illinois decision "threw off the inadequately expressed rules of the past". (R. 62:29.) He urged that subsequent federal decisions and decisions of other state courts should not be considered by the Illinois courts.

Thus, at page 25 of his Main Brief in the Illinois Supreme Court (R. 62:25), the appellant said:

> "It should be carefully noted that the Illinois Supreme Court, in the case of *Illinois Central R.R. Co.* v. *City of Chicago,* 173 Ill. 471, was clearly free to adopt and modify the general rules expressed by the United States Supreme Court in 146 U.S. 387 [the *Lake Front* decision], because the United States Supreme Court had there simply been stating common law rules applicable to the bed or soil of navigable waters and tidal waters. (146 U.S., at pp. 452, 457-459.) The question of the special attributes of the custodianship of the State of Illinois over its title to all the lands under Lake Michigan (whether navigable or tidal, or not) was expressly determined by the United States

Supreme Court, in affirming the Illinois Court's decision in *Illinois Central R.R. Co.* v. *City of Chicago* (173 Ill. 471), to be

> 'a question of local law with regard to which the decisions of the state courts are conclusive.' *(Illinois Central R.R. Co.* v. *City of Chicago,* 176 U.S. 646, 659 (1900).)"

In further support of his argument that the issue was one of local law, the appellant followed this quotation from his Main Brief below by citing *Shively* v. *Bowlby* (152 U.S. 1, 26), where this Court said:

> "The foregoing summary of the laws of the original States shows that there is no universal and uniform law upon the subject, but that each State has dealt with the lands under the tidewaters within its own borders* according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one State to cases arising in another."

The appellant then pressed the point further, going on to state, at pages 25-26 of his Main Brief (R. 62:25-26) that:

> "In *Revell* v. *People,* 177 Ill. 468 (1899), the Illinois Supreme Court again expressly recognized and took advantage of the fact that *rules respecting private rights in submerged Lake Michigan lands are completely the subject of local law* and there expressly

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* It is the "settled law in this country" that the interest of Illinois in Lake Michigan submerged land within its borders is the same as a coastal state's interest in tidelands within its borders along the seacoast. "The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes." (The *Lake Front* case, 146 U.S. 387, 435; accord, *People* v. *Kirk,* 162 Ill. 138, 147.)

> repudiated another 'general' common law rule stated by the United States Supreme Court in 146 U.S. 387, 446, 464, namely, the right (which riparian owners have in certain other States) to build out wharves and docks. (177 Ill. at pp. 486-489.)" (Emphasis added.)

The appellant construed the Illinois public trust doctrine as "a more stringent local rule for the State of Illinois." (R. 62:26.) He then tried to construe this local rule as wholly denying the Illinois legislature power to make *any* disposition of submerged Lake Michigan land to a private owner as provided in S.B. 782. But this erroneous construction of the Illinois decisions, which he said was his "Theory of the Case" on his appeal below (R. 62:5), was succinctly and correctly disposed of by the Illinois Supreme Court in its final opinion. (J. S. 5a.)

### B. State law Governs The Validity Of A Legislative Disposition Of A State's Submerged Lands.

The appellant concedes that there is no controlling federal law by virtue of "retained federal ownership or claim" to submerged lands along the shore of Lake Michigan within the State of Illinois. (J. S. 7.) The "federal law" which he advances is said to be the historic public trust doctrine, applicable to such submerged lands. The *Lake Front* decision, which expounds the public trust doctrine, is said to create a body of federal submerged land law. But that decision created no body of federal land law for the Great Lakes, as any careful reading of Mr. Justice Field's majority opinion will disclose and as subsequent decisions of this Court demonstrate.

The *Lake Front* decision holds that Illinois owns the submerged lands underlying Lake Michigan ". . . in trust for the people of the state." (146 U.S. 387, 452.) The decision further holds that in administering this trust the

state legislature only has power to make ". . . grants of parcels . . . that may afford foundations for . . . structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining." (146 U.S. 387, 452.) The decision summarizes the rationale of the distinction between valid and invalid grants as follows (146 U.S. 387, 453):

> "It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled."

Procedurally, the *Lake Front* case reached the federal courts, and came to this Court for ultimate decision, on the jurisdictional basis of the *railroad's* claim that the state's revocation of certain franchises or grants of submerged land impaired obligations of contract expressly protected by the Federal Constitution. (146 U.S. 387, 460-461.) The railroad asserted that an 1869 Act of the Illinois legislature conveyed Chicago lake front submerged land to the railroad and that a subsequent Act in 1873, by partially repealing the 1869 Act, nullified part of the conveyance and impaired the state's contract with the railroad which arose out of the 1869 Act. In the instant case, on the other hand, there has been no attempt to revoke rights granted by the legislation now in question. No issue of impairment of contract or other substantial question of federal law was raised in the courts below or presented by this appeal.

Substantively, the *Lake Front* case is most famous for its invalidation of the purported grant of the whole harbor

of a great city, as a "gross perversion of the trust." (146 U.S. 387, 454-455.) This grant, comprising more than 1,000 acres, was claimed to be a conveyance of all the submerged land lying off downtown Chicago between 12th and Randolph Streets for a distance of one mile eastward into the lake. (146 U.S. 387, 433-434.) However, the *Lake Front* decision specifically upholds more limited grants to the railroad. These consisted of reclamation for a railroad right-of-way, station grounds and yards. (146 U.S. 387, 443-448, 463-464.) The Court observed that these "cannot be regarded as such an encroachment upon the domain of the State as to require the interposition of the court for their removal or for any restraint in their use." (146 U.S. 387, 444.)

The doctrine enunciated in the *Lake Front* case, and the criteria for the valid exercise of the power of conveyance thereunder to private persons for private use, were adopted by the Illinois courts in *People* v. *Kirk*. (162 Ill. 138.) The *Kirk* decision, as a matter of state law, rejects the appellant's contentions. In *Kirk*, the Illinois court upheld legislation providing for conveyance of what is now part of Chicago's valuable Near North Side, a "large tract of land, containing 93 acres, held by the State in trust for the people [which] is taken and transferred to the adjacent shore owners, to be by them used for such purpose as they may think best, for their own personal interest." (162 Ill. 138, 148.) The legislation was valid because "the propriety or impropriety" of the legislation was for the legislature: "The question before us is not one of policy or expediency, but one of power." (162 Ill. 138, 148.)

The foregoing quotation is directly pertinent to the instant case, because the appellant offered no evidence at trial, expressly electing to rely solely upon the legal argument

that the Illinois legislature had no *power* whatever to pass S.B. 782. (J. S. 39a; R. 66:1-3.) He explicitly declined to contest the soundness of the Illinois legislature's finding (J. S. 35a) of legislative facts supporting the Bill. (J. S. 39a; R. 66:2-3.) The trial judge took care to ascertain the exact form of the appellant's theory, and made it clear for the record that the issue presented was whether, "purely as a matter of law, did the legislature —without any proof, now—have the power to do what they did." (R. 66:2.) The trial judge then said, "I don't want it presented on the theory that you were estopped from putting in any proof on either side." (R. 66:2.) And the judge was told by the appellant's counsel, "Oh, no, your honor, we are not." (R. 66:3.) The judge was assured, further, that the appellant was not "trying to pick out defects in some plan which, if there is a legal power to do it, we are satisfied with." (R. 66:1.)

Subsequent to the *Kirk* decision, in further litigation over the Illinois Central's lake front rights this Court confirmed that the public trust doctrine was one of state law. The Court observed, in *Illinois Central Railroad* v. *Chicago* (176 U.S. 646, 659), that the doctrine rested upon "the law of the State of Illinois, as laid down by the Supreme Court [of Illinois], not only in the case under consideration, but in the prior case of *People* v. *Kirk,* 162 Ill. 138. 146." Referring explicitly to the doctrine and its prior decision in the *Lake Front* case (146 U.S. 387), the Court stated (176 U.S. 646, 659):

> "This, too, is a question of local law with regard to which the decisions of the state courts are conclusive. *Packer* v. *Bird,* 137 U.S. 661; *Hardin* v. *Jordan,* 140 U.S. 371."

In the state courts the appellant here took exactly the same view. (R. 62:25.)

This Court since has repeatedly affirmed that the validity of conveyances of state-owned submerged land is governed by state law. For example, in *Port of Seattle* v. *Oregon & Washington Railroad,* (255 U.S. 56, 63), the Court speaking through Mr. Justice Brandeis held:

> "The State, being the absolute owner of the tide lands and of the waters over them, is free in conveying tide lands either to grant with them rights in the adjoining water area or to completely withhold all such rights. Whether a conveyance made by the State of land abutting upon navigable water does confer upon the grantee any right or interest in those waters or in the land under the same, is a matter wholly of local law. *Shively* v. *Bowlby,* 152 U.S. 1 *Upon such questions* the provisions of the constitution and statutes of the State and *the decisions of its highest court are accepted by us as conclusive.*" (Emphasis added.)

(Accord: *Appleby* v. *New York,* 271 U.S. 364, 395-402; *United States* v. *Holt Bank,* 270 U.S. 49, 54-55, 59; *Brewer Oil Co.* v. *United States,* 260 U.S. 77, 83-85; and *Scott* v. *Lattig,* 227 U.S. 229, 242.)

### C. The Illinois Courts Have Correctly Applied The State Public Trust Doctrine.

By committing the primary responsibility for the development of the Chicago lake front to the legislature, Illinois has placed the policy judgments required in the hands of the organs of government most directly responsive to the people. This is appropriate because of the balance of interests which must be resolved in connection with any lake front plans. Before there can be any disposition of submerged lakebed, under the Illinois public trust doctrine legislative action at the highest level is required upon the specific situation presented, to determine whether it is "in aid of commerce" or does not "substan-

tially impair the public interest in the lands and waters remaining." (*People* v. *Kirk,* 162 Ill. 138, 147.) This legislative determination is also subject to the check of the executive veto. In addition, the local zoning, city planning, anti-pollution, and other regulatory powers, as well as those of the Federal Government, are fully operative to assure that the use of the property is in accordance with appropriate regulations. The Illinois courts act as a final check to prevent a gross perversion of the public trust.

A *laissez-faire* approach, bestowing an inherent power upon riparian owners to reclaim adjacent lakebed, has been rejected. (*Revell* v. *People,* 177 Ill. 468; *Illinois Central Railroad* v. *Chicago,* 173 Ill. 471, *aff'd* 176 U.S. 646.) Likewise, the Illinois legislature has refused to follow the practice of other states which have adopted permissive general enabling acts. (E.g., Indiana, *Burns Anno Stat.,* §§62—701-703.)

The beneficial results of this approach are evident. While there may be honest differences of opinion as to individual projects, the over-all results have been uniquely successful. In the past 70 years most of the Chicago lake front has been converted from private ownership to public parks and facilities. Commercial and industrial uses which require deep water access, such as wharves, bulk shippers and steel mills, have been allowed on the lake front because of their obvious importance to the economy, but these uses have been confined to an area which has always been industrial and they occupy only a small part of the lake front, some 4 miles out of 22. The commercial and industrial uses are an integral part of Chicago's future. They provide employment-generating commercial and industrial activity to help sustain the appropriately more extensive lake front uses devoted to recreation and aesthetics.

The legislative action involved in the instant case complies with all prior decisions in Illinois, as the Illinois Supreme Court expressly held. (J. S. 5a-6a, 39a.) The legislative policy behind the conveyance which the appellant contests was expressed in Section 1 of S. B. 782 (J. S. 35a.):

> "the grant of submerged land contained in this Act is made in aid of commerce and will create no impairment of the public interest in the lands and waters remaining, but will instead result in the conversion of otherwise useless and unproductive submerged land into an important commercial development to the benefit of the people of the State of Illinois."

These policy judgments were adopted by the Illinois legislature with broad approval after careful deliberation. After hearings, the Bill was passed unanimously by the Illinois Senate, by a vote of 51-0. After further hearings it was passed by the Illinois House by a vote of 142-4. It was then approved by the Governor. (1963 Ill. Sess. Laws, 1229, 1231.) It also had widespread support from civic groups and the unanimous endorsement of the Chicago City Council. (R. 151:12-13 and 188:14.)

There was ample legislative justification for S.B. 782. In essence, the Bill represents good, balanced planning. It makes no change whatever in the existing patterns of use on the lake front. It strengthens the economic base of Illinois, by strengthening existing industrial uses in the area south of 79th Street. But it preserves the present uses of the lake front for park, civic and recreational uses north of 79th Street. (R. 57:121-129 and 151:12-20.)

All of the proposed fill area adjoins United States Steel's shoreline property. In this area, lying south of 79th Street, industrial expansion is wholly in accord with

historic and existing policies of the City of Chicago. The pioneer lake front plan, the famous Burnham Plan of 1909, contemplates continued use of limited portions of the Chicago lake front for industrial and port development, and specifically marks the area south of 79th Street, not for park purposes, but for industrial and port development. (See Burnham, *Plan of Chicago,* plates XLIV, L, LXIX, LXXII, and LXXIII; The Commercial Club, 1909.) Indeed, the detailed map of future development which includes the area now in question marks the specific area "Illinois Steel Co.", a corporate predecessor of United States Steel Corporation. (Burnham, *Plan of Chicago,* plate LXXII, page 65; The Commercial Club, 1909.) Subsequent civic and governmental plans for the lake front have continued the policy. These include: The Chicago Harbor Commission *Report* of 1909; *The Harbor Plan of Chicago* of 1927 by The Commercial Club of Chicago; The Chicago Plan Commission *Policy Statement on the Lakefront* of October, 1948; *The First Biennial Report* of the Chicago Regional Port District Board of February, 1953; and The Illinois-Indiana Bi-State Development and Study Commission *Report* of March, 1959. The history to 1957 is reviewed in Mayer, *The Port of Chicago,* at pages 13-23. (Chicago, U. of C. Press, 1957.)

There has been recent official confirmation of this lake front policy. In late 1964 the Chicago Department of City Planning reaffirmed this long-established policy in its major *Comprehensive Policies Plan*: "The Comprehensive Policies Plan strongly reaffirms the 1948 Chicago Plan Commission Lakefront Resolution, which declared that the entire lakefront should be used for recreational and cultural purposes, *except for the sections between Grand Avenue and Randolph Street and south of 79th Street.*" (*Basic Policies for the Comprehensive*

*Plan of Chicago,* 42; Department of City Planning, City of Chicago, 1964; emphasis added.)*

## II. The Supposed Federal Questions Now Sought To Be Presented Were Not Properly Raised Or Passed On By The Courts Below.

### A. The State Courts Considered The Case As Presenting Issues Of State Law Only.

None of the opinions of the Supreme Court of Illinois treats with any issue of federal law. (J. S. App. A.)

The appellant suggests (J. S. 13) that the Illinois Supreme Court expressly decided a federal question in that sentence of the final opinion (J. S. 6a) which alludes to "other constitutional grounds of attack on the statute in question, such as insufficiency of its title and violation of due process". But at that point of the opinion the court is concluding that it will affirm the determination made by the trial court "under the constitution and laws of Illinois" (J. S. 6a), and both of its allusions to "other constitutional grounds" plainly relate to specific, familiar provisions of the Illinois Constitution. Article IV, Section 13, of the Illinois Constitution requires formal sufficiency in the titles to legislative bills, and Article II, Section 2, is the state due process clause. The appellant had argued both in his Main Brief in the Illinois Supreme Court. (R. 62:15 and 62:56-59.) Moreover, in

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* Contrary to the appellant's unsubstantiated assertions of conflict of interest (J. S. 8-9), the vice president of United States Steel Corporation who serves on the Chicago Plan Commission—not the Department of City Planning—had nothing to do with the formulation of the Department's 1964 *Basic Policies* and has disqualified himself from participation in the Plan Commission's consideration of the implementation of the foregoing basic policies for the area of the lake front here in question.

the Illinois courts the appellant had not relied upon federal 14th Amendment due process as a ground of attack. (See this Motion, 17-20.)

Therefore, the Illinois Supreme Court's general allusion to "other constitutional grounds" is rightly within the rule that, if a state statute is challenged as "unconstitutional", it will be assumed that reference is being made to the state constitution. Where, as here, the state constitution has a due process clause, a general claim that "due process" has been violated will be deemed to relate to the state provision. (E.g., *Bowe* v. *Scott,* 233 U.S. 658, 664-665.)

It is most revealing that the dissenting opinion (J. S. 9a-19a), also found no federal issue. No intimation of a federal question appears in the dissenting opinion.

The trial courts also clearly did not pass on a federal question. The final order in the common law taxpayer's suit (J. S. 39a) is explicit about what was presented and decided:

> "The Court finds, as a matter of law that *under the Constitution and laws of Illinois,* including Article IV, Section 22 of the Illinois Constitution, that the Legislature had the power to pass the legislation in question, and that the Act of June 26, 1963 is valid." (Emphasis added.)

In the statutory taxpayer's action, the trial court's order again contains no indication that a federal question was considered (J. S. 38a), although the appellant was obliged to preserve explicitly any federal constitutional issues sought to be presented on appeal. (E. g., *New York Central Railroad* v. *New York,* 186 U. S. 269, 272-273; *Seno* v. *Franke,* 20 Ill. 2d 70, 73-74.)

**B. The Appellant Never Raised Federal Questions In The Courts Below.**

Neither the trial nor reviewing Illinois courts considered any federal questions because the appellant never raised one at any stage of the proceedings. He now urges questions of due process and equal protection under the 14th Amendment (J. S. 4-5), questions which he implies were raised by him below. (J. S. 12-15.) It is revealing, however, that he does not document the manner in which he actually presented his federal questions in the state courts. (See J. S. 12-15; contrast this Court's Rule 15 (1) (d).) In fact, the supposedly specific references to federal 14th Amendment due process and equal protection were inserted for the first time in his Jurisdictional Statement, as a look at the record will show. (Compare J. S. 12-14 with R. 62:8, 64:3, 209:13-14.)

The appellant never made a claim below, at any time, that the Illinois rules on standing to sue denied him equal protection, one of the principal federal questions he now poses. (J. S. 5, 15-19.)

The appellant suggests that his lack of standing as a taxpayer was an "unexpected procedural result." (J. S. 18.) But motions raising his lack of standing were the first responsive pleadings filed in the trial court. (R. 64: 15-22.) Moreover, the Illinois Supreme Court's first opinion held squarely that he had no standing to sue, citing long settled Illinois authority (J. S. 30a-34a), and in his first Petition for Rehearing, directed at that opinion, the appellant made no mention of any equal protection issue. (R. 82: 1-12.) Even his final petition for rehearing made no such claim. (R. 209:1-16.)

The appellant's federal substantive due process contentions stand on no better footing. He made no mention

of the 14th Amendment in his complaints (R. 46 and 64: 2-12.) And on appeal he did not refer to the 14th Amendment due process clause, or articulate any federal due process theory, or cite any federal substantive due process authorities (R. 44, 62, 74, 82, 89, 180, 209), not even in his final Petition for Rehearing. (R. 209: 1-16.)

In all of the appellant's briefs and pleadings in the state courts up to the final decision of the Illinois Supreme Court, there are exactly two brief allusions to the Federal Constitution and they are inadequate to preserve any federal constitutional question for review, both under the Illinois procedure and the practice of this Court.

The first of those allusions came in an early paragraph of the appellant's complaints where he alleged the capacity in which he was suing and the relief sought. There he made a general reference to "the constitutions, statutes, and laws of the United States and of the State of Illinois." (R. 64:3.) No more specific identification was made of any particular provision of the Federal Constitution or theory arising thereunder. (R. 64:2-12.)

Under Illinois procedure, constitutional challenges must be made in the trial court, and they must be made with specificity. (E. g., *Biggs* v. *Cummins,* 5 Ill. 2d 512, 516; *Seno* v. *Franke,* 20 Ill. 2d 70, 73-74.) "The particular respect in which the statute violates some constitutional limitation must be pointed out." (*Biggs* v. *Cummins,* 5 Ill. 2d 512, 516.) This Court imposes similar requirements of specificity (Rule 15 (1) (d)), and enforces state procedural requirements designed to secure a clear and timely presentation of federal constitutional challenges. (E.g., *Pennsylvania Railroad* v. *Illinois Brick Co.,* 297 U. S. 447, 462-463.) A mere general allusion to the "constitution, statutes and laws" is insufficient.

The appellant's second allusion to the Federal Constitution came at Page 8 of his Main Brief. (R. 62:8.) There the reference was as follows:

> "The underlying substantive doctrine that Lake Michigan lands are held in trust for the public is a part of the *basic law of this State,* and breach of that trust, as here alleged, involves questions arising under Article II, Section 2 of the Illinois Constitution, the XIVth Amendment to the Constitution of the United States; Article II, Section 14 of the Illinois Constitution, and Article IV, Section 22 of the Illinois Constitution, and Article IV, Section 13 of the Illinois Constitution." (Emphasis added.)

No further mention of the Federal Constitution or argument thereunder was made. The appellant's first "federal" theory (based on the *Lake Front* case, not on the 14th Amendment due process or equal protection clauses; R. 209:13-14) came in his second Petition for Rehearing *after* the final decision of the Illinois Supreme Court and in violation of Rule 39 of the state court* and of this Court's requirements. (Ill. Rev. Stat., ch. 110, §101.39; *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 128.)

Rule 28-1 (B) of the Supreme Court of Illinois requires that on appeal to that court, if the case involves "a question arising under the Constitution of the United States", then "the appellant's brief shall contain not only the jurisdictional statement preceding the Points and Authorities required by Rule 39, but as the first point in the Argument, a complete argument of the constitutional question." The "complete argument" required

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* Illinois Supreme Court Rule 39 in part provides: "No alleged error or point not contained in the [main] brief shall be raised afterwards . . . on petition for rehearing."

by Illinois Rule 28-1 (B) was nowhere made. The Federal Constitution was not mentioned further in the first point or any other point of the appellant's argument. (R. 62: 9-65.) He did not cite one federal due process or equal protection authority in his briefs or argument. (R. 44, 62, 74, 82, 89, 180, 209.)

**III. The Illinois Rules Regarding A Taxpayer's Standing To Sue Have Not Been Applied To Deny Equal Protection To The Appellant.**

The equal protection argument which the appellant makes here, but never presented below (see this Motion, 17-20), ignores the realities of the state court proceedings and of the Illinois law of standing to sue. The appellant says that the Illinois Supreme Court's alternative holding on the standing issue denied him equal protection. His reasons for claiming such a denial are without merit.

*First,* the Illinois Supreme Court did not "prevent a review of its decision" (J. S. 18) on the substantive issues presented to it. In fact, the Illinois courts *decided* the issues *on the merits,* for the Illinois Supreme Court held (J. S. 6a):

> "The trial court determined that under the constitution and laws of Illinois, including §22 of Article IV of the Illinois constitution, the legislature had the power to pass the legislation in question, and that the act of June 26, 1963, is valid. We conclude that this determination of the trial court is correct."

The appellant concedes this (J. S. 1, 6), as does the dissenting Illinois Supreme Court judge in the first sentence of his opinion. (J. S. 9a.) If the appellant had not lost on the merits, he would not have directed the bulk of his Jurisdictional Statement at the merits of the result below.

*Second,* the Illinois courts have not used standing as a device "to prevent this Court from correcting the virtual nullification of federal law." (J. S. 16.) In fact, the issues on the merits raise questions of state, not federal law. (See this Motion, 7-11.) The courts below *did* decide the issues of substantive law on the merits. They cannot be accused of evading review merely because those issues were not federal issues.

*Third,* the suggestion that the final action of the state Supreme Court was "unexpected" (J. S. 18), when it ren dered an alternative holding against the appellant's claims of standing, is demonstrably incorrect. The question of standing was in the case from the earliest stages in the trial court. (R. 64: 15-22.) On appeal, the first opinion of the Supreme Court was devoted exclusively to the appellant's lack of standing (J. S. 30a-34a), and the issue expressly remained in the case throughout the rehearings. (R. 132:5-7, 134:13, 209:12-13.)

*Fourth,* the result on the standing issue was hardly "unexpectable". On the contrary, it was completely consistent with settled Illinois equity practice. The Illinois precedents governing a taxpayer's lack of standing to challenge dispositions of property, as distinguished from money, are well established. The holdings of *Koehler* v. *A Century of Progress, Inc.,* (354 Ill. 347) and *McCormick* v. *Chicago Yacht Club* (331 Ill. 514, 521-522) were adverse to the appellant and were announced in cases involving lake front property. Moreover, the plain language of the Illinois Public Moneys Act (Ill. Rev. Stat., ch. 102, §§ 11, 12), which extends standing only to taxpayers' challenges to "disbursement of public funds" and "disbursement of public moneys", was opposed to the appellant's standing. Finally, the fact that United States Steel Corporation was a party certainly did not relax the equity rules as to

standing. The *Yacht Club* decision (331 Ill. 514, 521-522), involving private litigants, confirms this. (Contrast J. S. 18.)

*Fifth,* an examination of the historical development of this aspect of the Illinois law of standing can fairly arouse no suspicion that it has been developed as an "arbitrary discrimination" (J. S. 17) to frustrate the assertion of federally protected rights. (See the opinion below, J. S. 6a-15a.) The dissenting opinion in the Illinois Supreme Court especially confirms this, for it contains no hint of any federal infirmity in the Illinois law of standing. (J. S. 9a-15a.) On the record in this case any such claim is frivolous. In fact, the appellant has raised no federal right which he has been precluded from asserting under the Illinois law of standing. (See this Motion, 7-11.)

## IV. The Appellant's Unfounded Assertions Outside The Record Do Not Create Substantial Questions For This Court.

The appellant should address himself to the legal issues, rather than make undocumented and unfounded appeals to emotion and prejudice in the guise of an argument that "the questions are substantial." (J. S. 19-21.) Such appeals do not create substantial federal questions properly presented to this Court, and they contribute nothing to the sound resolution of the issues presented by this appeal.

The appellant does no service to this Court by inaccurately suggesting that this case involves "industrial despoilation of our major natural waterways"—when the fact is that the responsible policy making and planning authorities have weighed and approved the project in question, and it will be subject to full regulation under all

pertinent local, state and federal laws. Or by informing the Court that there are "no limits on the power of industry" under the public trust doctrine as applied below—when the fact is the state courts do impose limits, the same limits used by this Court in the *Lake Front* case, and when industry plays only a very limited role in the Chicago lake front plan, which has 18 of the 22 miles of lake front dedicated to public uses. Or by suggesting that the public is "outmaneuvered by the special interest pleaders," "without a forum"—when the fact is that legislative hearings were held at the local and state levels on the law in question, the legislation was duly approved by the legislature and Governor, and the appellant has had his contentions thoroughly considered by the courts of Illinois.

The appellant would have the Court believe that there is a need which only the courts can fill—indeed now only this Court, since he lost on the merits below. But the courts cannot create, finance and run a park. The courts cannot develop the economy of a region, or initiate measures to promote jobs. The courts cannot strike the proper balance between such programs—the balance desired by the people. The legislative and executive departments of the government must carry out such programs.

Because he disagrees with the policy adopted by the duly constituted policy making bodies, the appellant would interject this Court into the policy making process. That is precisely what he seeks—for he says the Illinois legislation in question is invalid, yet he expressly elected (J. S. 39a; R. 66:1-3) to offer no evidence to rebut the legislative policy established by S.B. 782 (J.S. 35a), a legislative judgment which has ample justification. (R. 57:121-129 and 151:12-20.) It is contrary to fundamental prin-

ciples of the separation of powers and representative government to allow any individual to thwart the people and their elected government, under the guise of invoking judicially the "true meaning" of an undefined protective doctrine "such as only the United States Supreme Court can provide." (Compare J. S. 20-21.) This would be a "judicial trespass on the legislative function," as the Third Circuit put it in a recent Virgin Islands case involving a grant of more than 1,200 acres which was attacked upon the same theories as the appellant now urges. (*Smith* v. *Virgin Islands,* 329 F. 2d 135, 144, *cert. den.* 377 U.S. 979.)

## CONCLUSION

This appeal presents no federal questions whatever. The appellant should not be permitted to invoke the jurisdiction of the Court upon a theory completely contrary to that which he asserted throughout protracted litigation in the courts of Illinois.

The state courts decided the case on state law grounds. The public trust doctrine, applied in the *Lake Front* decision and many other cases, "is a question of local law with regard to which the decisions of the state courts are conclusive." (*Illinois Central Railroad* v. *Chicago,* 176 U.S. 646, 659.) The Illinois procedural requirements of standing to sue in taxpayers' suits are also requirements of state law, and they were not applied to deny equal protection to the appellant taxpayer or to evade federal law. In this case the appellant received a determination on the merits of his supposed "federal" issue—the application of the public trust doctrine—which is really "a question of local law," not federal law.

These are the matters properly before this Court, and they plainly present no federal question of substance. We respectfully submit that this appeal should be dismissed and that the appellant's alternative prayer for certiorari should be denied.

Respectfully submitted,

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November, 1966.

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# Supreme Court of the United States

October Term, A. D. 1969

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No. 971

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ALBERT C. DROSTE,

*Appellant,*

vs.

OTTO KERNER, Governor of the State of Illinois, WILLIAM J. SCOTT, Attorney General of the State of Illinois, and JAMES B. CARROLL, WILLIAM J. McCARTHY, JAMES M. ARGYRIS, JOHN LEVEN and ROBERT J. [illegible], Commissioners of the Chicago Park District, constituting all members and officers of the BOARD OF [illegible],

*Appellees.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1966

NO. 671

ALBERT C. DROSTE,

*Appellant,*

vs.

OTTO KERNER, Governor of the State of Illinois, WILLIAM CHAMBERLAIN, Secretary of State of the State of Illinois, and JAMES H. GATELY, WILLIAM L. McFETRIDGE, JACOB M. ARVEY, JOHN LEVIN and JOSEPH L. GILL, Commissioners of the Chicago Park District, a municipal corporation, and UNITED STATES STEEL CORPORATION, Intervenor,

*Appellees.*

(On Appeal from the Supreme Court of Illinois.)

## MOTION TO DISMISS

Otto Kerner, Governor of the State of Illinois, and Paul Powell, Secretary of State of Illinois, appellees herein, by William G. Clark, Attorney General of the State of Illinois, pursuant to Rule 16 1(b) of the Revised Rules of the Supreme Court of the United States, move to dismiss this appeal on the grounds that it does not present a substantial federal question, and that appellant lacks the requisite standing to support this appeal.

## ARGUMENT

### I.

### THIS APPEAL RAISES NO SIGNIFICANT FEDERAL QUESTION.

The instant case was appealed to this Court on the basis that an act of the Illinois General Assembly conveying certain submerged land under Lake Michigan to the United States Steel Corporation was attacked by appellant in the Illinois courts and upheld by the Illinois Supreme Court against an allegation of its invalidity based on federal grounds. In this point it will be shown that the questions presented to the Illinois Supreme Court were, in essence, questions of state law and that no substantial federal question is presented by this appeal.

### A.

### THE QUESTION OF THE INTERPRETATION AND APPLICATION OF THE PUBLIC TRUST DOCTRINE IS A QUESTION OF STATE LAW.

Appellant contends that because the origin of the public trust doctrine in Illinois lies in the decision of this Court in *Illinois Central Railroad Co.* v. *People of the State of Illinois,* 146 U.S. 387, the interpretation of that doctrine is a federal question. This contention completely overlooks the fact that this Court has held that the question is one of state law. The case relied on by appellant reached this Court on the basis of a Contract Clause contention and not on the basis that the public trust doctrine involved any federal question. In a subsequent decision by

this Court in that case, *Illinois Central Railroad Co.* v. *Chicago,* 176 U.S. 646, the issue of whether the application of the public trust raised any federal question was completely answered in the negative. There this Court said at 176 U. S. p. 659:

> "Under the law of the State of Illinois, as laid down by the Supreme Court, not only in the case under consideration, but in the prior case of *People* v. *Kirk,* 162 Illinois, 138, 146, 'the State holds the title to the lands covered by the waters of Lake Michigan lying within its boundaries, but it holds the title in trust for the people, for the purposes of navigation and fishery. The State has no power to barter and sell the lands as the United States sells its public lands, but the State holds the title in trust in its sovereign capacity, for the people of the entire State.' Such was also the ruling of this court in a case between the same parties, *Illinois Central Railroad* v. *Illinois,* 146 U. S. 387, affirming *Illinois* v. *Illinois Central Railroad,* 33 Fed. Rep. 730. This, too, is a question of local law with regard to which the decisions of the state courts are conclusive. *Packer* v. *Bird,* 137 U. S. 661; *Hardin* v. *Jordan,* 140 U. S. 371."

Thus the public trust doctrine raises no federal question, and appellant's attempt to invoke the jurisdiction of this Court on that basis is invalid.

It is also equally clear that the requirements of the public trust doctrine were properly applied by the Illinois Supreme Court.

In the original *Lake Front* case, *Illinois Central Railroad* v. *Illinois,* 146 U. S. 387, this Court stated that the submerged lands under the Great Lakes are governed by the same rule as governs tidewater lands, and that rule is such lands are owned by the states in which they are located and that state may use or dispose of any portion when it "can be done without substantial impairment of

the interest of the public in the waters and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States." 146 U. S. at p. 435.

Here there was clearly no interference with the Congressional right to control navigation. In this regard it is relevant to note that before the land can be filled in there must be approval from the Corps of Engineers. Likewise the interest of the public in the waters has not been substantially impaired. The land in question is in a commercial area, and the Legislature believed that the interest of the citizens would be better served by an expansion of industry in this location. It is significant that U. S. Steel had no other place to expand its existing Illinois plant and the new proposed plant might have been lost to Illinois if this land were not made available. There was no violation of the public trust doctrine.

## B.

## APPELLANT'S CONTENTIONS OF A DENIAL OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW RAISE NO SUBSTANTIAL FEDERAL QUESTIONS.

It is contended by appellant that the decision of the Illinois Supreme Court in this case constitutes a denial of Due Process and Equal Protection. However, this contention was never properly raised in the Illinois courts and is, therefore, not within the scope of review by this Court. Also if it were to be considered, it is clearly invalid.

In the trial court, the only allegation of appellant's complaints which is in any way relevant to this conten-

tion is the allegation in the amended complaint in the common law action that the proposed conveyance is "invalid, unauthorized, and void under the constitutions, statutes, and laws of the United States and of the State of Illinois . . ." (Abstract [No. 38905] p. 3). This contention, which did not state which provision of federal law was alleged to be violated or the manner in which it was alleged to be violated, did not raise any real federal question.

As this Court said in *People of State of New York* v. *Zimmerman,* 278 U. S. 63 at pages 67-68:

> "With these general rules in mind we turn to what is shown in this case. The petition for habeas corpus, while asserting that the state statute was 'unconstitutional', contained no mention of any constitutional provision, state or federal. The opinion delivered by the court of first instance was similarly indefinite. Up to that point it is left uncertain whether the claim of invalidity was grounded on some provision of the state Constitution, or on some provision of the Constitution of the United States, or on both. If this were all, there plainly would be no basis for a review in this court."

In the Illinois Supreme Court, no question of any violation of the Due Process or Equal Protection Clauses of the Federal Constitution was included in appellant's brief except for a general statement that there was a violation of the Fourteenth Amendment. Under Illinois Supreme Court Rule 39, because this point was not argued, it was waived. The only time such a question was directly raised by appellant was in a point in his Petition for Rehearing from the final decision in which he states that the plaintiff and other citizens were equitable owners of the submerged land and by the conveyance this property right was "denied".

As this Court said in *Bowe* v. *Scott,* 233 U. S. 658 at p. 663:

> "As it is elementary that a mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no ground for invoking the jurisdiction of this court unless the court below in dealing with the petition for rehearing considers and passes upon the Federal ground therein relied upon, we dismiss that subject from view and come to consider whether the record otherwise discloses that a Federal question was so raised below as to support our jurisdiction."

A later decision of this Court again declaring that the raising of a federal question in a petition for rehearing is too late is *Hanson* v. *Denckla,* 357 U. S. 235.

Here it can not be contended that the allegation in the petition for rehearing was passed on by the Court when it was made after the final opinion had been issued and that opinion was never modified thereafter.

The Illinois Supreme Court did state in its opinion in this case that it had considered constitutional objections to the conveyance. The Court said:

> "The plaintiff suggests other constitutional grounds of attack on the statute in question, such as insufficiency of its title and violation of due process. We have carefully examined them and find them to be without merit. The trial court determined that under the constitution and laws of Illinois, including section 22 of article IV of the Illinois constitution, the legislature had the power to pass the legislation in question and that the act of June 26, 1963, is valid. We conclude that this determination of the trial court is correct." (Appendix to Jurisdictional Statement, p. 6a)

From the context in which this statement was made it is clear that the Illinois Supreme Court was considering objections under the Illinois Constitution which were raised

in appellant's briefs, not objections under the Federal Constitution which were not. This is shown from the statement of the Illinois Supreme Court that it concludes the determination of the trial court that "under the constitution and laws of Illinois . . . the legislature had the power to pass the legislation in question . . ." is correct.

Thus since these questions were not properly presented at trial, and especially so because they were not presented to or ruled upon by the Illinois Supreme Court, this Court lacks jurisdiction to consider them here. However, even if the allegations of lack of Due Process and Equal Protection under the Federal Constitution were to be considered, these protections were not violated.

In order to properly establish that Due Process and Equal Protection were not violated by the conveyance in question it is necessary to separate appellant's contention on this point into three different allegations:

1) *First,* appellant contends that since under the public trust doctrine this land was held in trust for the public, the conveyance of the property by the Illinois Legislature to another is a taking of his property without Due Process.
2) *Second,* appellant contends that to convey the property to one citizen and not all is a violation of Equal Protection.
3) *Finally,* appellant contends that to deny his suit on the basis that a citizen lacks standing to attack a conveyance of state lands where a citizen can attack an expenditure of public monies is a violation of Equal Protection especially where the Attorney General, on request, will not attack the conveyance.

These contentions are invalid. The first contention alleging a violation of Due Process must be predicated

on the basis that the requirements of the public trust doctrine were violated by the conveyance in question. If the argument were not so predicated it would mean that every conveyance of submerged land by the state would be a violation of Due Process. Since this is obviously not true, it appears to be appellant's belief that only a conveyance which violates the public trust doctrine is a violation of Due Process. There are many valid answers to that contention. Among them are the fact that as previously established, the conveyance in question was not in conflict with the public trust doctrine; the fact that the Legislature which is the principal guardian of the public trust deemed the conveyance to be for the benefit of all the citizens; the fact that, since the interpretation of the public trust doctrine is not a federal question, as previously established, a violation of its proper interpretation, even if present, cannot be a violation of Due Process; and the fact that while the submerged land is held by the state for the citizens in general, no individual has a property right in that property which could be protected by Due Process.

Appellant's second point, that conveying the land to one citizen rather than another is a violation of Equal Protection is equally invalid. Again a conveyance of state land, submerged or otherwise, must necessarily run in favor of some person or institution. This is not a violation of Equal Protection where the Legislature believes it is in the public interest for the grantee to have this land even if no consideration is paid for it. The land grants to railroads in the early history of our nation establish that point. Here, of course, there was consideration paid for the land. Clearly it is not a violation of Equal Protection to sell state lands to a private individual or corporation. Admittedly the consideration was not large,

$19,460. But it was deemed fair by the Legislature in light of the public interest in having a new steel plant at that location, and the admittedly large expenditures which would be necessary to reclaim this submerged land. Even absent those factors, however, a sum of almost $20,000 cannot be considered merely nominal. No valid violation of Equal Protection is established by this contention.

Finally, appellant asserts that to deny him standing to contest the conveyance of public land while allowing a citizen to contest an expenditure of public funds is a violation of Due Process. The best answer to this contention lies in the fact that both the trial court and the Illinois Supreme Court ruled on his contentions on the merits. True, the Illinois Supreme Court as an alternative basis for its decision held that the appellant or a person in his position has no standing to challenge a conveyance of state land, but this was in addition to its holding on the merits. Since this rule was not applied to prevent appellant from obtaining a ruling on the merits, he clearly has no standing to challenge it. No one has standing to attack a statute or decision unless he is adversely affected by it. "In the absence of a showing of injury, actual or threatened there can be no constitutional argument" (*Anderson National Bank* v. *Luckett*, 321 U. S. 281 at p. 242.)

On a broader level, even if this ruling or standing had been applied to appellant's detriment, it would not have resulted in a denial of Equal Protection. In essence, appellant's contention is that it is a denial of Equal Protection to allow a citizen to attack the expenditure of state funds but not the conveyance of state lands. This contention is invalid on its face because no discrimination occurs; everyone is treated equally. If any citizen wishes to contest a state expenditure he may do so; no citizen can

contest a conveyance of state lands unless he shows special damage. Since everyone is treated equally, there is no discrimination and no violation of Equal Protection. A real distinction is present between how a state spends its money and how it disposes of its property. Money is an asset which is always of value to a state and its citizens. Land may be excess and of no value to the state or its citizens except for the money which can be obtained in exchange for it. To allow a citizen to attack any state conveyance on the ground the state did not obtain the best possible price for it would open the doors of the courts to questions which are really incapable of judicial determination, and are best left to the discretion of the state legislative body.

Appellant also states that this issue is more grave because the Attorney General of Illinois, the only party who in the absence of special injury can attack a state conveyance and who is specially in charge of submerged lands under the public trust doctrine refused to bring this suit on request.

While the duties of the Attorney General of Illinois are many and varied, it is significant to note that among them are the defense of state officials sued in their official capacity and the defense of state legislation which he deems valid. For both reasons he defended the instant suit.

This does not mean he does not take action to protect the submerged lands of the state where he deems the public trust doctrine has been violated. Indeed, he recently attempted to assert this doctrine for recovery of air rights over submerged lands where he believed they had never been properly conveyed by the Legislature in *Hickey* v. *Illinois Central Railroad* —— Ill. 2d——. But merely because requested by one citizen he is under no obliga-

tion to attack a conveyance of state lands he believes valid under the public trust doctrine. His discretion in this matter cannot be controlled, and must not be controlled, by individual citizens.

Since the appellant states no substantial federal question, this appeal should be dismissed.

## II.

## PLAINTIFF HAS NO STANDING TO PRESENT THIS APPEAL.

The Illinois Supreme Court as an alternative basis for its decision held that the plaintiff has no standing to present this appeal. This holding should be conclusive in this Court.

It is, of course, true that whether a state supreme court correctly holds on the question of standing to present a federal question is a question of federal law which this Court can reconsider on appeal.

It has long been the federal rule that a person who is adversely affected has standing to contest the validity of a state law, and if a state court denies that right this Court is not bound by that determination.

In the instant case, the appellant is not adversely affected except as a citizen and taxpayer. The federal rule is long established that a taxpayer has no standing to contest the expenditure of federal funds. *Frothingham* v. *Mellon,* 262 U. S. 447.

Illinois adopts a more liberal policy and allows a citizen to attack an expenditure of state funds but not a conveyance of state lands unless he can show a special injury. Because this is more liberal than the federal rule, it should

here control in light of the fact that it is not unconstitutional as previously established in this brief.

Thus since under both the federal and the Illinois rule appellant has no standing to bring this appeal, it should be dismissed.

## CONCLUSION.

For the reasons stated, it is respectfully submitted that the instant appeal should be dismissed for failure to state a substantial federal question, and treating the appeal as a petition for a writ of *certiorari, certiorari* should be denied on the same basis.

Respectfully submitted,

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ON APPEAL FROM THE
SUPREME COURT OF ILLINOIS

## APPELLANT'S BRIEF OPPOSING APPELLEES' MOTIONS TO DISMISS

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ON APPEAL FROM THE
SUPREME COURT OF ILLINOIS

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# APPELLANT'S BRIEF OPPOSING APPELLEES' MOTIONS TO DISMISS

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**Statement of the issue.—**

In respect to the important public question here, of the limitations on state power to grant away submerged Great Lakes lands, appellees' motions to dismiss make two

points which in fact serve to establish this appeal. They say that (1) appellant was not specific enough in his federal claims below, and (2) the public trust doctrine is entirely a matter of local law.

A mere glance at pages 450-462 of the decision of this Court in *Illinois Central R. Co.* v. *Illinois,* 146 U.S. 387, will suffice to show that either that decision is wrong or appellees are wrong in their contentions—the very conflict which this appeal seeks to have settled.

This Court was there plainly not declaring Illinois law, but rather, what it considered to be fundamental limitations on the police power of the State of Illinois, which was held not competent to breach or abdicate the public trust of Lake Michigan submerged lands by attempted enactment of a statute very similar to the one here in issue.

This federal decision by the highest Court in the land stands as the law of the land and is the very matter which, under the arguments of both sides here, is chiefly in issue. This appeal is to test a similar exercise of legislative power by the State of Illinois as against the doctrine of that federal decision. No clearer basis for this Court's jurisdiction could appear.

**The alleged lack of specificity of federal claim below.—**

This is a direct function of the fact that the decision in 146 U.S. is itself federal law relied upon; and, that decision failed to be any more specific than was appellant below in citing the particular provisions of basic federal law which invalidate the kind of exercise of state police power here in question. Appellant ventured below to specify the XIVth Amendment, which was clearly ade-

quate to make the point since the decision below expressly decides the due process issue. (R. II, 194). The fact of such express decision disposes, in itself, of appellees' motions to dismiss—unless this Court can somehow be prevailed on to conceive of the Illinois Supreme Court as so provincial that it does not consider the XIVth Amendment to be involved in an express decision on "due process."

**The "local law" claim.—**

If the underlying limitations stated in 146 U.S. on the power of the State legislature to convey this public trust property are now to be deemed a matter of "local law," only this Court can authoritatively so declare; and appellees' contention to this effect is thus a reason why review should be had in this case.

We take the statement as to "local law" in *Illinois Central Railroad Co.* v. *Chicago,* 176 U.S. 646, 659, to be as we presented it below, namely, as concerning the extension by the Illinois Supreme Court of the underlying federal protection established in 146 U.S. to the further point of absolutely proscribing any grant (however small in size) of this public trust property for private, non-navigational uses:

> "It is true that the State holds the title to the lands covered by the waters of Lake Michigan lying within its boundaries, but it holds the title in trust for the people, for the purposes of navigation and fishery.
>
> • • •
>
> It is not proposed here, to take or appropriate the land in question [4.4 acres] for the erection of wharves, docks or piers, the construction of which may facilitate or aid the navigation of the waters of the lake, but the sole purpose seems to be to appropri-

ate the submerged land for the private use of the railroad company." *(Illinois Railroad Co.* v. *Chicago,* 173 Ill. 471, 485, 487).

It was the above special rule of local protection which was the matter on appeal in—and referred to in appellees' quotation from—this Court's decision in 176 U.S. (The *Kirk* case, 162 Ill. 138, mentioned in the same quotation, involved the opposite facet of this local rule—a statute enacted for the *public* purpose of building a lake shore parkway.)

This special, more absolute rule of trusteeship, going beyond the broad underlying federal criteria of protection stated in 146 U.S., was, indeed, the point most thoroughly argued below—because it specifically and unequivocally read on the statute in question, which is nothing more nor less than a special grant for private industrial purposes.

That the Illinois court, in its unexpected third and final decision below, repudiated its own rule of extended local protection to this public trust means that its express retreat to the broader lines of the underlying federal protection provides this Court with a clear basis for jurisdiction to determine the basic issue in this case—whether the court below has, as appellant contends and appellees deny, substantially misapplied that federal doctrine in this case.

**The standing-to-sue question.—**

Appellees' argument on this point is really based on the same assumption that no federal question is presented by the express reliance by the court below, in deciding the merits, on the public trust doctrine established by this Court in 146 U.S. If a federal question is presented by that decision (as it clearly appears to be),

the matter of the State's denial of standing to raise that question is a matter of federal law which this Court can, and should, consider.

Just as the decision in 146 U.S.—to which the Illinois Court has returned—denies the very specificity of constitutional claim on the merits which appellees now assert should have been presented from the very first, so does their claim fall of its own weight that the constitutional issues raised by appellant's being denied standing to sue should have been more specifically pleaded. A plaintiff does not come into court alleging that he has no standing to sue (and that this is unconstitutional for such and such reasons, etc.). The trial court denied appellees' motion to dismiss for lack of standing and, after the intervention of the Steel Company, there was no reason to expect that the question of standing was of any further significance. In any event, the second opinion below, by an eminent judge, Mr. Justice Schaefer, seemed to have settled that matter for good.

It cannot be gainsaid that the final reversal of itself by the Illinois court below, both on standing-to-sue and on the merits, was, in respect to the very matters presented by this appeal, unexpected and unexpectable and that appellant has done what he could to meet the vagaries of the judicial decisional process as manifested in this unusual case.

**Public policy and the importance of this appeal.—**

The basic policy in concern is the federal protection of an acknowledged public trust of Great Lakes submerged lands which is here plainly subverted by special, private usurpation. Rationalizing a political power play as legislative policy-making with which the judiciary

should not interfere is no answer to the limitations on legislative action already set by judicial decision many decades ago. It is those limitations, based on the law of the land established by this Court, that appellant seeks to enforce. We repeat that the heritage of millions of people in the Great Lakes region is here at stake, for if Illinois can grant away its lakefront to private use by means of special statute favoring only one named industrial company and calling for the abrogation of a long-standing grant of this property to a municipal corporation for public recreational use, there is no future protection of the public trust left.

Appellees concede that "gross" perversions of what they euphemistically continue to describe as the public trust are subject to judicial invalidation. The instant perversion is the most "gross" of all, for it effectively destroys every vestige of a *public* trust.

**Conclusion.—**

It is respectfully submitted that the appellees' motions (not joined in by the Chicago Park District) to dismiss this appeal should be denied and that this Court should review the important question of public conservation of our great natural waterways here presented, either by appeal or, alternatively, by granting certiorari.

Respectfully submitted,

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